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SELECTIVE PROSECUTION OF RELIGIOUSLY MOTIVATED OFFENDERS IN AMERICA

Scrutinizing The Myth of Neutrality

Joel Fetzer

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**Dedicated in Memory of
Susan Ann Bernier
(1967-1988)**

Que son âme trouve le bonheur.

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Béni soit le nom de Yahvé.

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Chapter I

Background and Statement of Hypotheses

According to official decisions by the Supreme Court, public policy and religion should not mix. The Court claims, for example, to be committed to the principle of "separation of church and state." In *Everson v. Board of Education* it ruled that the religion clause of the First Amendment ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof")¹ "was intended to erect a 'wall of separation between church and State.'"² This metaphor seems to require governmental neutrality towards religion; in other words, religion should be kept out of legal and policy decisions as much as possible. Indeed, the Court in *Everson* came to a similar conclusion:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. *No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . . [The First Amendment] requires the*

*state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.*³ [Emphasis added.]

The government, then, is not to take sides among religions, nor is it to treat its citizens differently based on their religious beliefs.

Despite the Supreme Court's official claim that the government should be neutral toward religion, it seems that in practice the government is sometimes less than blind to religious beliefs and motivations. Probably because it must explain its decisions to the public, the Supreme Court only rarely admits to making exceptions for religiously motivated offenders.⁴ When in cases such as *Wisconsin v. Yoder*⁵ it does, however, the Court tries its best to pretend it is not practicing favoritism towards religion, and often obscures this bias towards religion by explaining its actions without referring to religion, or by covering up its consideration of religion in official declarations of neutrality. Studying the official decisions of the Supreme Court to determine how the government considers religion, therefore, would not prove fruitful. Such decisions would only proclaim how the government should behave in theory. We must look elsewhere to discover how the federal government deals with religion in day-to-day politics.

Since religion is not supposed to play a part in their considerations, if government officials will have to explain their behavior to Congress or the public, they would seem less likely to take actions for which they could later be accused of improper religious considerations. One should find more religious considerations, then, where officials do not have to explain their actions. Since the number of

decisions increases as the freedom to make those decisions increases, one would also expect to find more religious considerations in discretionary actions than in non-discretionary ones. The ideal place to study religious considerations in the government, then, would be where decision making is secret and highly discretionary.

On the federal level, that action which may best fulfill these two criteria for finding religious considerations may be the Department of Justice's decision to prosecute; for the decision to prosecute is informal, highly discretionary, usually secret, and rarely subject to outside review. Federal prosecutors do not have to explain their actions in front of congressional panels. Nor do Justice Department rules allow the release of internal memoranda to the public. Even senators are sometimes refused authorization to keep copies of prosecutorial documents they review at the Department.⁶

Federal attorneys do not hide the amount of discretion that they wield. The DOJ's official guidelines, *Principles of Federal Prosecution*, for example, openly describe the nature of their powers:

Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and *even whether to prosecute* for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. . . . This discretion exists by virtue of his status as a member of the Executive Branch, which is charged under the Constitution with ensuring that the laws of

the United States be "faithfully executed."⁷ [Emphasis added.]

Thus, the Department's prosecutors seem to view their discretionary powers as an integral part of their constitutional mandate to enforce the law.

Since "federal law enforcement resources and federal judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists,"⁸ the Department must select defendants based on several factors, including "federal law enforcement priorities," the "nature and seriousness of the offense," and the "deterrent effect of prosecution."⁹ In using this prosecutorial discretion, however, federal attorneys are not supposed to let the religion of a potential defendant enter into their decision:

6. In determining whether to commence or recommend prosecution or take action, the attorney for the government should not be influenced by:

- (a) the person's race; *religion*; sex; national origin; or political association, activities, or beliefs;¹⁰ [Emphasis added.]

Thus, although according to official policy statements and traditional "American" principles of justice, the U.S. government should not take religion into account in deciding whom, how, and whether to prosecute, the evidence that I have collected seems to indicate that a potential defendant's religion occasionally *does* matter. In the three prominent criminal prosecutions that I have chosen to study, the defendants' religion appears to have played a major role in how the Executive Department's investigative and law enforcement mechanism responded to

their alleged violations of the law. The case of the "Sanctuary Movement" appears to suggest that the government had strong reservations about prosecuting clergy and devout laypersons, and about arresting alleged felons and illegal aliens in a church building. In deciding whether to investigate and prosecute the Rev. Sun Myung Moon for tax evasion, the Internal Revenue Service and the Justice Department seem to have at least considered his status as the founder and leader of an international "cult." In the third case, the firebombing of abortion clinics by opponents of *Roe v. Wade*, the defendants' religious motivations seem to have played more than a secondary role in the government's treatment of them. In each of these three cases, then, it seems that the appropriate governmental agencies (the Department of Justice, Immigration and Naturalization Service, Internal Revenue Service, and Bureau of Alcohol, Tobacco and Firearms) have indeed let religious considerations influence their decisions to investigate and prosecute. The concluding chapter will deal with whether or not the government *should* take religion into account. The following case studies, however, will first try to establish what *does* occur in the decision to prosecute before proceeding to any normative questions.

These three cases seem to confirm a general hypothesis about governmental actions against religious groups: American society seems less likely to tolerate religion when one or both of the following conditions exist: 1. society regards a religion's belief system or its purely religious practices as extreme or dangerously outside the mainstream of contemporary religious belief and practices; and/or 2. society believes that the secular actions that a religion inspires are extreme or dangerously outside the society's limits of "normal" behavior. When either or both of these

conditions occur, Americans will support action to "punish" the offenders. When these "offenses" take place on a national scale, the federal criminal justice system may be the most effective tool for enforcing these two societal norms.

Table I-1

The Relationship Between Americans' View of Offenders' Behavior and the Government's Treatment of Them

	<i>Americans believe group's religious beliefs and practices are:</i>	<i>Americans believe group's religiously inspired actions are:</i>	<i>Federal government's treatment of group:</i>
<i>Sanctuary Movement</i>	moderate	moderate	lenient
<i>Reverend Moon</i>	extreme	moderate	severe
<i>Abortion- Clinic Bombers</i>	moderate	extreme	severe

In order to illustrate this phenomenon, I have studied how three federal investigative agencies (the INS, IRS, and BATF) and the federal prosecutorial agency (the DOJ) have handled three representative cases. The prosecution of Rev. Moon for tax evasion shows how the federal government treats violators of the first norm (extreme religious practices or beliefs), and the case of the abortion-clinic bombers illustrates the government's reaction to violators of the second norm (extreme religiously inspired secular actions). As a "control" case, I consider the Sanctuary Movement, which our society seems to think is moderate both in the religious beliefs and practices of its participants, and in the religiously inspired actions they have taken.

The evidence I have collected suggests that Table I-1 is reasonable, and a simplified version of the causal model

would appear as in Table I-2. In other words, the federal government takes note of whether most people approve or disapprove of a given religious group's behavior (i.e., whether or not most people consider the group to have followed the two hypothesized "norms"). The amount of public approval or disapproval helps determine whether government officials will investigate and prosecute, or whether they will leave a particular religious group alone.

Table I-2

Causal Model for the Government's Prosecutorial Response to Americans' Disapproval or Approval of Offenders' Behavior

American Society	---> <i>disapproves</i>	Federal Government	---> <i>prosecution or severity</i>	"offenders" punished
American Society	---> <i>approves</i>	Federal Government	---> <i>no prosecution or leniency</i>	"offenders" rewarded

Table I-3

The Government's Prosecutorial Behavior as a Function of Net Public Support Versus Net Public Opposition

		PUBLIC OPPOSITION:	
		<i>High</i>	<i>Low</i>
PUBLIC SUPPORT:	<i>High</i>	placate both sides	lenient treatment
	<i>Low</i>	severe treatment	no prosecution

A more sophisticated way to look at how the government perceives and acts upon the public's views of religiously motivated offenders would be to consider the support and opposition each offender or group of offenders has among various respectable constituencies. "Public approval" would mean more support from respectable

constituencies than opposition, and "public disapproval" would mean more opposition than support. A potential defendant's fortunes, then, would rise or fall depending on the degree of support and opposition from the constituencies. Illustrated graphically, cases of religiously motivated defendants should exhibit the pattern shown in Table I-3. Thus, if a group of offenders enjoys high support but low opposition, the government would try to avoid prosecuting or otherwise antagonizing them. If, however, opposition is high and support is low, the government would seem more likely to prosecute or otherwise act harshly against a group of potential defendants. In the more ambiguous case of both high support and high opposition, the federal government would try its best to placate both sides and antagonize neither, which obviously makes for contradictory policy and actions. When a group has both low support and low opposition, the government would probably not consider it a high enough priority to prosecute, and thus the group would benefit from apparently "lenient" treatment. According to the above hypothesis, the government would treat the three main groups I have studied and two similar cases as in Table I-4.

Of the cases studied, the Sanctuary Movement seems best to fit the category of high support/low opposition, and their treatment by the government seems to confirm my hypothesis. For the Movement enjoys strong support from almost all persuasions of the American religious community as well as from a broad base in Congress and the general populace. Its opposition, on the other hand, seems limited to a small section of right-wing activists and parts of the Reagan Administration. Probably as a consequence of this net support, the federal government has been very lenient with sanctuary workers who have violated U.S. immigration

laws. Compared to similar secular offenders, they have been prosecuted and perhaps even investigated much less severely.

Table I-4

Case Studies Illustrating the Government's Prosecutorial Behavior as a Function of Net Public Support Versus Net Public Opposition

		PUBLIC OPPOSITION:	
		<i>High</i>	<i>Low</i>
PUBLIC SUPPORT:	<i>High</i>	televangelists/ Bakker's PTL Ministries (placate both sides)	Sanctuary Movement (lenient treatment)
	<i>Low</i>	Reverend Moon, abortion-clinic bombers (severe treatment)	"hustlers"/ "Reverend Ike" (no prosecution)

In the low support/high opposition category, however, the government has investigated and prosecuted almost mercilessly. As the leader of an international "cult," the Reverend Sun Myung Moon is, or at least was at the time of his trial for tax evasion, nearly universally despised. Although many religious leaders came to his defense when his case was on appeal to the Supreme Court, this eleventh-hour support appears to have been ineffective both because it came too late and because these clergy most likely lacked the backing of the laity which they supposedly represented. The IRS and DOJ, therefore, investigated and prosecuted Moon harshly.

Lacking any real support from even the "Pro-Life" community and vehemently condemned by "Pro-Choice" activists and the public at large, the abortion-clinic bombers also suffered harsher treatment at the government's hands as compared with similar, secularly motivated offenders.