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HARD LAW AND SOFT POWER: COUNTER-TERRORISM, THE POWER OF SACRED PLACES, AND THE ESTABLISHMENT OF AN ANGLICAN ISLAM

Peter W. Edge^{*}

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^{*} LL.B., Ph.D. (Cantab.), Professor of Law, Oxford Brookes University. Thanks to Mark Walters for his valuable research assistance; and to Peter Cumper of Leicester University; Augur Pearce of Cardiff University, and participants at the CEU/BYU Expert Seminar on Religious Autonomy (Budapest, May 2009) and Oxford Society for Law and Religion Conference (Oxford, June 2009) for their comments on earlier drafts of this paper. The errors, and opinions, remain my own.

Following the terrorist attacks in London on July 7, 2005, commonly referred to as 7/7, the power of sacred places was problematized, and the United Kingdom (“U.K.”) government considered formal legal regulation of sacred places, and in particular of the religious activities taking place therein. This hard law response to the power of sacred places was dropped following a negative consultation, where respondents stressed the impact on, to use United States (“U.S.”) terminology, the free exercise of religion. Instead, the U.K. government has sought to exercise soft power to effect theological change in some Islamic communities – again to use U.S. terminology, moving from restricting free exercise to establishing religion. Although the latter strategy avoids a frank conflict with religious rights, it risks creating the establishment of religion through an Anglican Islam. Such an establishment would not be unconstitutional in U.K. terms, but does merit greater public discussion than has currently been the case, particularly since the form of establishment being adopted seems considerably more intrusive to the established religious community than the current establishment of the Church of England.

I. INTRODUCTION

In the wake of the terrorist attacks on London on 7/7, the U.K. government proposed the creation of a new legal regime to deal with the power of sacred places. Concrete, explicit proposals which would have led to frank restrictions on the free exercise, or in European Convention on Human Rights (ECHR) terms, manifestation, of religion led to concrete, concerted opposition, particularly by civil society groups. This opposition centered on concerns about how far the restriction on the free exercise of religion could be justified. As a result, the proposals were withdrawn. Instead, the government has favored the exercise of soft power, in particular financial power, to effect theological change in Islamic religious communities. The hard law proposals were dealt with far more explicitly than the implications of this soft strategy. They do not pose the same sort of free exercise concerns as the original proposals, but they do raise very serious concerns about the relationship of the U.K. State to some forms of Islam, perhaps going as far as to constitute a creeping establishment of these forms of Islam in the U.K.—an Anglican Islam consisting of *Mujtama’ al Islam al Enkilizi* rather than *ecclesia anglicana*.¹ In sharp contrast to the position in the United States, such an establishment is not unconstitutional in the distinctive position of the United Kingdom. It is, however, undesirable.

¹ See Supremacy Act of 1534, 26 Hen. 8, c.1 (Eng.) (the Crown is referred to as “the only supreme head in earth of the Church of England, called Anglicans Ecclesia”).

This paper begins with a brief introduction to the power of sacred places, and a consideration of the U.K. approach to dangerous sacred places before 7/7, highlighting the role of the Charity Commission. This provides the context to discussion of the hard law proposals of 2005, which were dropped following a consultation process showing the level of public engagement with hard law restrictions on the free exercise of religion. The paper then moves on to consider the development of a softer strategy to regulate dangerous sacred places, in particular the attempt of the U.K. government to effect theological change in some Islamic communities within the United Kingdom. The final sections evaluate this approach, primarily by drawing upon the mature jurisprudence of the United States Supreme Court on the prohibited establishment of religion under the United States Constitution.

II. THE POWER OF SACRED PLACES

As Sibley suggests, “[t]o mark off sacred spaces, to define boundaries which can be defended, they have to be imbued with special qualities.”² What do we mean when we call a place sacred – what are these special qualities? There are at least three ways of viewing the power of sacred places.

The first view, which can be categorized as the theological, is based upon the application of statements as to metaphysical reality to determine the character of a place. Within the discipline of a religious community, it is possible to judge whether a particular place is sacred or not – and in some communities, to go further and to stratify levels of sacredness. Consider, for instance, the Babri Masjid-Ram Temple Dispute in Ayodhya, India.³ To some Hindus, the site is seen as the birthplace of Ram in a previous age of the earth. The sacredness of the site is not simply because it has become a center for religious life within conventional history, but because of events before and beyond conventional history. The site is sacred only if the theology is accepted. Such theology is not, however, accepted by the Muslims who also venerate the site. Some Muslims also base the importance of the site on events preceding conventional history, and

² David Sibley, *Endangering the sacred: Nomads, youth cultures and the English countryside*, in *CONTESTED COUNTRYSIDE CULTURES* 218 (Paul Cloke & Jo Little, eds., Routledge 1997).

³ See also Christu Rajamony, *Sacred Sites and International Law: A Case Study of the Ayodhya Dispute* (2007) (unpublished Ph.D. thesis, Oxford Brookes Univ.) (on file with author).

squarely in religious narratives. It is asserted that one of the sons of the first human persons on earth, Adam and Eve, was Seth, who is buried in Ayodhya, along with Noah, a later figure from the same narratives.⁴ Once again, from this perspective the argument for the sacredness of the site only works if the theology is accepted. It is not enough that the site is sacred to some individuals or communities; the question is whether it is *actually* sacred. Once the State renounces the authority to resolve metaphysical truth, however, adopting the theological perspective entails an excessive entanglement of a particular religion with the State. To return to the Ayodhya example, if the Indian State were to determine that Ayodhya was authentically sacred to Hindus, because it was the birthplace of Ram, but not to Muslims, because Seth never existed, it is hard to posit a definition of State neutrality which would cover the relationship of the Indian State to either Hinduism or Islam. Within the context of the ECHR, “[t]he state’s duty of neutrality and impartiality . . . is incompatible with any power on the state’s part to assess the legitimacy of religious beliefs.”⁵

The second view, which can be categorized as the human rights perspective, sees sacred places as contributing to the exercise of the religious rights guaranteed by international human rights law. A place is sacred because of its religious significance to the individual or community.⁶ In effect, the human rights perspective shifts from the objective view of sanctity of the theological perspective (“sacred”) to a subjective view of sanctity which can accommodate religious diversity (“sacred to”). In *Manoussakis and Others v. Greece*,⁷ for instance, a community of Jehovah’s Witnesses had rented a room as a meeting place. The community lodged an application to use the room as a place of worship, and while they were waiting for this application to be processed, they were prosecuted for using an unregistered place of worship.⁸ The European Court of Human Rights stressed the impact of the restriction on members of the

⁴ See MOHAMMAD JAMIL AKHTAR, *BABRI MASJID: A TALE UNTOLD* 10-15 (Genuine Publications & Media Pvt. Ltd. 1997).

⁵ *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, 50 Eur. Ct. H.R. 43, 66 (2009).

⁶ See Belden Lane, *Giving Voice to Place: Three Models for Understanding American Sacred Space*, 11 RELIG. & AM. CULTURE 53 (2001). In terms of Lane’s analysis, this adopts a cultural understanding of sacred places, rather than an ontological or phenomenological one.

⁷ *Manoussakis v. Greece*, 23 Eur. Ct. H.R. 387, 390-91 (1996).

⁸ *Id.* at 391.

community.⁹ In this case, the State action was to be judged against a narrow margin of appreciation, as “the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature in the notion of a democratic society.”¹⁰

The third view, which can be categorized as the social capital perspective,¹¹ sees sacred places as important generators of social capital.¹² Social capital stands for the ability of actors to secure benefits by virtue of membership in social networks or other social structures. Such capital may be provided by socially similar others, in which case it is often support capital, which helps people cope with problems posed by their circumstances. It may also be offered through diverse ties, in which case it may be leverage capital which helps people change their life chances or create and take advantage of opportunities.¹³ Both forms of social capital may contribute to the common good, and provide routes by which the communities themselves can benefit.¹⁴

These are not, of course, mutually incompatible perspectives on the power of sacred places. A place may have layers of significance. The same place may be important to world culture as a site of archaeological and historical importance;¹⁵ to neighbors as an attractor of noise and nuisance into a quiet area;¹⁶ to local businesses as a focus for economic development and tourism; and to frequent visitors as a significant place with “deep emotional meaning.”¹⁷ It may also be defined as sacred by a theological system, treated as sacred by a religious community, and function as a generator of social capital for that community. From a legal perspective, however, the theological perspective is difficult to square with the plural, and to

⁹ See generally *id.*

¹⁰ *Id.* at 407.

¹¹ See Peter W. Edge, *The Construction of Sacred Places in English Law*, 14 J. ENV. L. 161 (2002).

¹² See Greg Smith, *Religion, and the Rise of Social Capitalism: the Faith Communities in Community Development and Urban Regeneration in England* 37 CMTY DEV. J. 167 (2002); William H. Lockhart, *Specifying the Bridges and the Cargo: Social Capital, Faith-based Programs and the Poor*; and Derek Bacon, *Factors Relating to Participation in Faith-based Local Social Welfare Organizations: Social Capital and Community Changes in Northern Ireland*, in Spring Research Conference Papers of The Roundtable on Religion and Social Welfare Policy, available at http://www.religionandsocialpolicy.org/docs/events/2003_spring_research_conference/lockhart.pdf.

¹³ See also Robert Wuthnow, *Religious Involvement and Status—Bridging Social Capital*, 41 J. SCI. STUDY OF RELIG. 669 (2002).

¹⁴ Smith, *supra* note 12, at 133.

¹⁵ *Chappell v. United Kingdom* App. No. 12587/86 Eur. Comm’n H.R. Dec. & Rep. (1988).

¹⁶ *Ex parte Sarvan Singh Seera*, 53 P. & C.R. 281 (Q.B.D. 1986).

¹⁷ Shampa Mazumdar & Sanjoy Mazumdar, *Religion and Place Attachment: A Study of Sacred Places*, 24 J. ENVTL. PSYCHOL. 385 (2004).

some extent pluralist, religious context of countries such as the United Kingdom. The human rights perspective and the social capital perspective can both be applied in such a context, and until recently were seen as complementary.

III. THE U.K. APPROACH TO DANGEROUS SACRED PLACES BEFORE 7/7, AND THE CHARITY COMMISSION

Until recently, insofar as sacred places were seen as generators of social capital, this was seen as being beneficial to both those communities which saw the places as sacred, and to society more broadly. Some sacred places were seen as generating leverage capital, such as sacred places within prisons¹⁸ or registered places of worship which are open to the public.¹⁹ Others were seen as generating support capital – providing a space “used not only for religious practice but also for social and cultural occasions. Communal worship has become important not only for its spiritual value, but also as an opportunity for meeting at a social level.”²⁰ Even where a place was seen primarily as providing space for a community to be with itself, perhaps involving restrictions on dissident voices,²¹ it was generally assumed that the public as a whole benefited.²² Allowing the exercise of fundamental religious rights was a good in itself.

It is plain, however, that capital of any sort can be used in a way contrary to the interests of the State. As Dinham and Lowndes have noted, “[f]aith group resources may take the form of human capital (e.g., staff, volunteers, and members), social capital (e.g., networks of trust and reciprocity), physical capital (e.g., community buildings and venues), and financial capital (e.g., collections, subscriptions, and donations).”²³ In the United Kingdom, as elsewhere post 9/11, the State has been keen to ensure that funds intended for religious charities are not used to support

¹⁸ Prison Act, 15 & 16 Geo. 6, c.52 §§7, 10 (Eng.).

¹⁹ Places of Religious Worship Act, 1812, 52 Geo. 8, c. 155 (Eng.); Liberty of Religious Worship Act, 1852, 15 & 16 Vict. 1, c.36 (Eng.); Places of Worship Registration Act, 1855, 18 & 19 Vict., c. 81; *Ex parte Segerdal* 2 Q.B. 697 (1970) (A.C.) (Eng.).

²⁰ Kim Knott, *Other Major Religious Traditions*, in *THE BRITISH: THEIR RELIGIOUS BELIEFS AND PRACTICES 1800-1986* at 133,148 (Terence Thomas, ed., 1988).

²¹ See Ecclesiastical Courts Jurisdiction Act, 1860, 23 & 24 Vict., c. 32 § 2; Burial Laws Amendment Act, 43 & 44 Vict., c. 41 § 7; *Abrahams v. Cavey*, 1 Q.B. 479 (Q.B.D. 1968).

²² *But see* Marcus Alexander, *Determinants of Social Capital: New Evidence on Religion, Diversity and Structural Change*, 37 B. J. POL. SCI. 368 (2007).

²³ Adam Dinham and Vivien Lowndes, *Religious Resources and Representation: Three Narratives of Faith Engagement in British Urban Governance*, 43 URBAN AFFAIRS REV. 817, 829 (2008).

terrorist activities.²⁴ Immediately after 9/11, the activities of Islamic charities were placed under particular scrutiny.²⁵ This resulted in encouragement for strong financial controls, proper record keeping,²⁶ and formal governance of the charities by properly qualified persons.²⁷ An emphasis on compliance with the formal rules governing the charity – normally to be found in the constitutional documents of the particular charity – has led to the State becoming involved in disputes over leadership of a number of charities, typically where trustees and members form two opposed camps.²⁸

A. The Role of the Charity Commission

The U.K. government – including arms-length bodies with a statutory basis such as the Charity Commission – has taken strong action to deal with a particular problem: that of the use of sacred places to generate social capital for terrorism. Mosques in the U.K., as in the U.S.,²⁹ have been subject to surveillance and investigation as possible foci for terrorism, with concerns over “the recruiting activities of several mosques. Evidence of those recruiting activities comes from admissions by suspected terrorists that experiences at certain London mosques radicalized them. The figurehead of the Finsbury Park mosque, to which several suspects have connections, openly supports Islamic extremism.”³⁰

²⁴ See Jude McCulloch & Sharon Pickering, *Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-colonialism*, 45 B. J. CRIMINOLOGY 470 (2005).

²⁵ See Gideon Burrows, *Under Suspicion*, GUARDIAN ONLINE, Nov. 28, 2002, available at <http://www.guardian.co.U.K./society/2002/nov/28/charitymanagement.britishresponsetoseptember11>.

²⁶ See, e.g., Al-Falah Islamic Foundation, registered charity no. 1081281; Islamic Association of North London, registered charity no. 272690; Rugby Mosque Society, registered charity no. 503021; The Bangladesh Shomity, registered charity no. 293676.

²⁷ See, e.g., Bolton Muslim Welfare Trust, registered charity no. 1005715; Kingston Muslim Association, registered charity no. 274503; The Al-Khoei Benevolent Foundation, registered charity no. 802000; The Preston Muslim Society Quwwatul Islam Mosque, registered charity no. 700936.

²⁸ See, e.g., Islamic Centre, Redhill, registered charity no. 281189; Thamesdown Islamic Association, registered charity no. 276549; and, especially, The Islamic Centre of Plymouth and Cornwall, registered charity no. 1048445. *But see* Higham Hill Mosque Trust, registered charity no. 1041212; Islamic Education Trust and Masjid Abu-Baker (RA), non-registered organization.

²⁹ See Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 621 (2004); see also Tom Lininger, *Sects, Lies and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1204 (2004).

³⁰ Virginia Helen Henning, *Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights?*, 17 AM. U. INT’L L. REV. 1263, 1280-81 (2002).

Before returning to the Finsbury Park mosque, it is first necessary to introduce an important structure for control of the majority of mosques in the United Kingdom: the Charity Commission. The Commission is a civil regulatory body responsible for promoting effective use of charitable resources, and investigating and checking abuses.³¹ It may instigate inquiries into charities, a particular charity, or a class of charities.³² Having instituted an inquiry, two causes for concern can trigger the use of extensive powers – either (1) misconduct or mismanagement in the administration of the charity; or (2) a threat to the property of the charity.³³ Where either has been found, the Commission may, *inter alia*, suspend a trustee, officer, agent or employee of the charity pending consideration being given to such individual's removal;³⁴ appoint additional trustees to manage the trust;³⁵ and freeze the assets of the charity.³⁶ If both causes for concern are present, the trustees may remove any trustee, officer, agent or employee who has been responsible for or privy to the misconduct or mismanagement or has, by his or her conduct, contributed to or facilitated it.³⁷ Although not a prosecutor, the Commission works closely with the police, and reports any criminal offenses it uncovers during its work to the police,³⁸ and the police on occasion reporting possible abuses of charitable funds uncovered during other investigations.³⁹

The Commission has described itself as being “alert to the possibilities of charities being used to further or support terrorist activities. It will deal with any allegation of potential links between a charity and terrorist activities as an immediate priority.”⁴⁰ Funding, that is, financial

³¹ Charities Act, 2006, c. 50 § 7 (Eng.).

³² Charities Act, 1993, c. 10 § 8 (Eng.).

³³ This recently includes a range of investigative powers under the Regulation of Investigatory Powers Act 2000. Regulation of Powers Act, 2000, c. 23 (Eng.); see Kenneth Dibble, *Regulating Charities at Home and Abroad*, 26 SOLIC. J. CAS 19 (2004).

³⁴ Charities Act, *supra* note 32, at §18(1)(i).

³⁵ *Id.* at § 18(1) (ii).

³⁶ *Id.* at § 18(1)(iv).

³⁷ *Id.* at § 18(2).

³⁸ See, e.g., Amanat Charity Trust, registered charity no. 1000851.

³⁹ See, e.g., The Bangladesh Shomity, registered charity no. 293676.

⁴⁰ The Islamic Foundation, registered charity no. 263371, ¶ 8. The Commission's role has also been recognized by the Foreign and Commonwealth Office. See Dibble, *supra* note 33, at 21. For a recent example of action following designation of a trustee under the Terrorism (United Nations Measures) Order 2006 and the Al Qaida (United Nations Measures) Order 2006, see Al Ikhlas Foundation, registered charity no. 1047844.

capital, has been a particular concern.⁴¹ The impact of the use of financial capital can be increased through social capital,⁴² but social capital can itself further particular causes. For instance, we may see social capital working to enhance information flows, provide free spaces, shape socialization and political participation, and bestow both authority and legitimacy.⁴³

In relation to ideological support for terrorism, the most significant investigation has been that of Finsbury Park Mosque.⁴⁴ The Finsbury Park Mosque is owned and operated by the North London Central Mosque Trust.⁴⁵ The Trust was registered in 1988 in order to advance and promote the knowledge of the religion of Islam in the United Kingdom and abroad. The Charity Commission became involved in 1998, when the trustees of the charity that operated the mosque sought to regain control of the building. A settlement was reached which put the trustees back in charge, but allowed Abu Hamza, the Imam, to continue to deliver half of the Friday sermons.⁴⁶ A month after 9/11, the Commission received a tape of a sermon given by Hamza, available in the mosque shop and online, which they considered to be “of such an extreme and political nature as to conflict with the charitable status of the mosque.”⁴⁷ The trustees were required by the Commission to stop Hamza from using the building for political purposes but they lacked the funds for legal action.⁴⁸ In April 2002, Hamza was suspended from acting for the mosque, and an investigation into his activities began.⁴⁹ He was found to have organized a “highly inflammatory and political” conference to mark the first anniversary of 9/11 without the

⁴¹ See Nicholas Ryder, *Hidden Money*, NEW L.J. (Charities Supplement) 36 (2008); Nicholas Ryder, *Danger Money*, NEW L.J. 6 (2007).

⁴² Michael W. Foley, John D. McCarthy and Mark Chaves, *Social Capital, Religious Institutions and Poor Communities*, in SOCIAL CAPITAL AND POOR COMMUNITIES: A VOLUME IN THE FORD FOUNDATION SERIES ON ASSET BUILDING 217 (Susan Saegert, J. Phillip Thompson & Mark R. Warren, eds., 2001).

⁴³ *Id.* at 226-29.

⁴⁴ See also United Kingdom Islamic Mission, registered charity no. 250275.

⁴⁵ North London Central Mosque Trust, registered charity no. 299884 (hereinafter “CC Report”).

⁴⁶ *Id.* at ¶ 7.

⁴⁷ *Id.* at ¶ 14.

⁴⁸ *Id.* at ¶¶ 16-17.

⁴⁹ *Id.* at ¶ 20.

authority of the trustees;⁵⁰ to have allowed his supporters to live in the mosque; and to have acted as signatory for a bank account in the name of the mosque of which the trustees knew nothing.⁵¹

While he was suspended in January 2003, the police raided the mosque in search of evidence of terrorist activity.⁵² The raid was directed at the office and accommodation parts of the building rather than those sections used for prayer, and “[o]fficers wore covers over their shoes in respect of Muslim beliefs.”⁵³ In February 2003, Abu Hamza was permanently removed as an agent of the charity in order to put the trustees back in charge, ensure the use of the mosque for charitable purposes, and to protect the reputation of the mosque.⁵⁴ The Charity Commission indicated that the mosque was back under the control of the trustees, although it was closed while repairs to the damage caused by the raid were made.⁵⁵ The mosque remained closed for 18 months, and was reopened in August 2004 with new trustees.⁵⁶ It was reported that in December 2004, “hardliners” had again taken control, with allegations that they enforced their will through violence and intimidation, and “preached sermons which some at the mosque regarded as extreme.”⁵⁷ The Charity Commission intervened again, and in February 2005, appointed new trustees who “changed the locks and took physical control of the building,” with police officers on hand in case of trouble.⁵⁸ The new trustees had been appointed following consultation with the Muslim Association of Britain.⁵⁹ The Trust recognizes 2005 as a discontinuity, noting that:

[t]he work of the new management reflects the proper role of a mosque – as a place of worship, religious learning and social interaction. It also presents the true teachings of Islam as a religion of tolerance, cooperation

⁵⁰ *Id.* at ¶ 22. A second anniversary commemoration by Al-Mahajiroun proved similarly contentious. See George Wright, *MP wants Islamist 9/11 ‘conference’ banned*, GUARDIAN ONLINE, Aug. 28, 2003, available at <http://www.guardian.co.uk/uk/2003/aug/28/religion.september11>.

⁵¹ CC Report, *supra* note 45, at ¶ 21.

⁵² Vikram Dodd, *Radical cleric barred from mosque*, GUARDIAN ONLINE, Feb. 5, 2003, available at <http://www.guardian.co.uk/uk/2003/feb/05/voluntarysector.religion>.

⁵³ Leader, *A Mosque is no Sanctuary*, GUARDIAN ONLINE, Jan. 21, 2003, available at: <http://www.guardian.co.uk/uk/2003/jan/21/terrorism.guardianleaders>.

⁵⁴ CC Report, *supra* note 45, at ¶ 26.

⁵⁵ *Id.* at ¶ 27.

⁵⁶ See Vikram Dodd, *Extremist leaders ousted from north London mosque*, GUARDIAN ONLINE, Feb. 8, 2005, available at <http://www.guardian.co.uk/uk/2005/feb/08/religion.world>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

and peaceful harmony amongst all people who lead a life of balance, justice and mutual respect.⁶⁰

B. The Hard Law Proposals

The Finsbury Park Mosque investigation, while an extreme example, illustrates the extensive power the Charity Commission has to control sacred places whose owners have charitable status. Not all sacred places are the same, however. Some sacred places are physically bounded, dedicated to religious uses, and owned by a religious charity. Others may have multiple uses or be operated by an individual or a company. Loosely bounded sacred places remain powerful places, however, and in 2005 moved onto the policy agenda.

Following the suicide bombing on 7/7, then Prime Minister Tony Blair proposed, among his raft of counter-terrorism measures, to “consult on a new power to order closure of a place of worship which is used as a centre for fomenting extremism.”⁶¹ A detailed consultation paper then followed.⁶² The paper referred to places of worship as “a resource for the whole community.”⁶³ The paper proposed additional powers which could be used where places of worship had been taken over by those seeking “to disseminate extremist views and practices,”⁶⁴ and the community of worshippers had not been able to deal with the problem themselves.⁶⁵ The powers of the Commission were recognized,⁶⁶ but it was noted that “not all places of worship are owned by charities,” and so not subject to the Commission’s jurisdiction,⁶⁷ which is discussed more fully below. The existing criminal liability of individuals for inciting terrorism, and possible future offenses related to incitement were also noted;⁶⁸ but this was also seen as

⁶⁰ North London Central Mosque Trust: About Us, http://www.nlcentralmosque.com/index.php?option=com_content&view=section&layout=blog&id=4&Itemid=26 (last visited Mar. 30, 2009).

⁶¹ See Tony Blair, U.K. Prime Minister, August 2005 Monthly Press Conference (Aug. 5, 2005), available at <http://www.number-10.gov.uk/output/Page8041.asp>.

⁶² Home Office, *Preventing Extremism Together: Places of Worship*, Oct. 6, 2005, available at <http://www.homeoffice.gov.uk/documents/cons-prev-extreme/cons-prev-extreme?view=Binary>.

⁶³ *Id.* at ¶ 4.

⁶⁴ *Id.* at ¶ 7.

⁶⁵ *Id.* at ¶ 9.

⁶⁶ *Id.* at ¶ 12.

⁶⁷ *Id.* at ¶ 14.

⁶⁸ Home Office, *supra* note 62, at ¶ 15.

inadequate to deal with situations where places of worship were “acting as focus points for extremist activity.”⁶⁹

The consultation paper proposed a new power. The controllers of a place of worship could be required by a court to take steps to prevent certain extremist behavior occurring there.⁷⁰ Extremist behavior would be defined as “that which the police reasonably believe[d] amount[ed] to support for a proscribed organi[z]ation, or the proposed new offense of “encouragement of terrorism.”⁷¹ Only the police could request such an order; and such a request would “generally” be made only after the Charity Commission and individual criminal routes had been tried and found wanting.⁷² Once an order had been made, the controllers would be guilty of a criminal offense if they failed to take reasonable steps,⁷³ which the report suggests could include measures such as: restricting access to the place of worship; updating protective security; or altering procedures for booking space.⁷⁴ In addition, if the first order failed to put an end to the extremist behavior, the police could reapply to the court for a second order, which would restrict the use of the place of worship, and could include temporary closure of all or part of the premises.⁷⁵ The paper sought guidance on five issues, including the merits of the proposed new power, the definition of places of worship in practice (in particular whether they should include meeting rooms or faith schools), and whether the safeguards for the proposed power were sufficient.⁷⁶

The paper resulted in a significant number of responses, which were collected and published by the Home Office [hereinafter “Responses”].⁷⁷ A number of noteworthy points may be drawn out of the responses by pressure groups, religious associations, local government officials, policing organizations, and members of the public. The first of these concerns the impact of the proposed new power.

⁶⁹ *Id.* at ¶ 16.

⁷⁰ *Id.* at 17.

⁷¹ *Id.*

⁷² *Id.* at ¶ 18.

⁷³ *Id.* at ¶ 20.

⁷⁴ Home Office, *supra* note 62, at ¶ 19.

⁷⁵ *Id.* at ¶ 21.

⁷⁶ *Id.* at ¶ 26.

⁷⁷ Home Office, *Preventing Extremism Together: Places of Worship - Collected Responses* (Dec. 15, 2005), available at <http://www.homeoffice.gov.uk/documents/cons-prev-extreme/responses-doc?view=Binary>.

The radical nature of the proposed new power was identified by the hostile majority of respondents. The powers of the Charity Commission depended, at least to some extent, on the community choosing to structure its ownership of the sacred place in charitable terms.⁷⁸ Communities that strongly objected to their sacred places being subject to this jurisdiction could choose not to seek the benefits of charitable status.⁷⁹ The proposed powers would not be subject to this right of non-entry.⁸⁰ If we may refer to a broader current in the interaction of law and religion, the religious community associated with a sacred place would no longer be able to safeguard their religious autonomy by exercising a right to exit from the public sphere.⁸¹ This would be a substantial restriction on religious autonomy, and the corporate exercise of religious rights, introducing a limited form of religious registration into U.K. law.

The adverse impact of the new power upon religious autonomy was particularly stressed. In terms of the relationship between religious communities and the State, the proposals risked alienating religious communities when a better approach would be to support communities “as *they* deal with the issue of extremism in their midst.”⁸² Additionally, the chilling effect of the legislation could reduce positive contact between members of the community and the police.⁸³ In terms of the religious interests of individuals and their communities, the power was severely criticized as a retrograde step in terms of the development of religious freedom, with some respondents specifically placing such control in a historical context for their community.⁸⁴ The scale of the impact of closure upon the place’s religious community was emphasized,⁸⁵ with resistance by the community and “mass protests” anticipated by one respondent.⁸⁶ There was a fear that use of the powers, when actions against individual extremists had failed, constituted a

⁷⁸ See, e.g., Dr. David Goodbourn, General Secretary, Churches Together in Britain and Ireland. *Id.* at 7.

⁷⁹ See, e.g., *Mohammed v Khan* EWHC 599 [2005].

⁸⁰ I would note, however, that once a sacred place has entered the charitable sphere, shifting it to non-charitable uses is not straightforward – a right to exit in the face of an increasingly active Charity Commission cannot be assumed.

⁸¹ See, e.g., Jeff Spinner-Haley, *Autonomy, Association, and Pluralism*, in *MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY* 157 (Avigail Eisenberg and Jeff Spinner-Halev, eds., Cambridge Univ. Press, 2005).

⁸² Revs. Martin Camroux & Dr. John Parry, United Reformed Church, Responses, *supra* note 77, at 35.

⁸³ Richard Wiltshire, Mayor of London’s Office, Responses, *supra* note 77, at 88.

⁸⁴ See, e.g., Dr. David Goodbourn, General Secretary of Churches Together in Britain and Ireland, Responses, *supra* note 77, at 7.

⁸⁵ See, e.g., Rev. Paul Seymour, Responses, *supra* note 77, at 18.

⁸⁶ Sukhvinder Singh, Sikh Federation, Responses, *supra* note 77, at 53.

form of “communal punishment.”⁸⁷ In conjunction with the developing definition of supporting extremism the powers were seen as “criminal[izing] . . . thought and belief,” and “silenc[ing] dissidents.”⁸⁸

Religious rights are not, however, absolute rights, and it might be possible to accept the strength of these criticisms, but justify the restrictions by reference to a broader public interest – in ECHR terms, restriction of a right under Article 9 being justified by the grounds in Article 9(2).⁸⁹ Although not in these terms, respondents did generally question the basis for government justifications of the measures.

The fit between the power and a genuine mischief was queried by many respondents. A number of responses, which appear from textual similarities to have been coordinated, queried the extent of the problem, and suggested that only in the case of Finsbury Park Mosque had “links between a place of worship, extremist preaching, and terrorist activity been alleged.”⁹⁰ The need for evidence-based policy making in this area was stressed – the consultation document had not sufficiently made the case that there was a significant problem which needed to be addressed.⁹¹ If there was a problem with places being used as foci for extremism, the case for sacred places being particularly problematic was not made out. The application of the new power to places of worship rather than other meeting places was seen as “ill-conceived and arbitrary,”⁹² with the suggestion that “other places of gathering [were] far more likely to be used for extremist activity.”⁹³ Also related to the question of justificatory fit, the coverage of all places of worship by the power was queried from both directions. Some respondents feared they

⁸⁷ See, e.g., Morag Mylne, Church and Society Council, Church of Scotland, Responses, *supra* note 77, at 76-77.

⁸⁸ See, e.g., Islamic Human Rights Commission, Responses, *supra* note 77, at 55. Some of those in broad support of the powers, however, saw some dissidents as suitable for silencing, with the new powers enforcing a separation between religion and extremism. See, e.g., Jon Benjamin, Board of Deputies of British Jews, Responses, *supra* note 77, at 69.

⁸⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocol No. 11, 155 E.T.S. (1994) (entered into force Nov. 1, 1998), art. 9, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm>.

⁹⁰ See, e.g., Rev. Paul Wordsworth, Vice-Chair of York Churches Together, Responses, *supra* note 77, at 10; Rev. Graham Ridgwell, Vicar of the Camps and Horseheath, Diocese of Ely, Responses, *supra* note 77, at 15. Less clearly connected responses raised the same issue. See, e.g., Roger Wiltshire, Mayor of London’s Office, Responses, *supra* note 77, at 88.

⁹¹ See, e.g., Shaukat Warraich, Faith Associates, Responses, *supra* note 77, at 96.

⁹² See, e.g., Rev. David Perry, Vicar of Skirlaug, Long Riston, Rise and Swine, Responses, *supra* note 77, at 14.

⁹³ See, e.g., Catherine M. Dumford, Canon, Responses, *supra* note 77, at 16.

would be seen as targeted at mosques, and risk generating resentment and greater extremism in the Muslim communities;⁹⁴ and stigmatizing such communities in the eyes of society more broadly.⁹⁵ This was seen as particularly problematic by the Islamic Human Rights Commission.⁹⁶ Alternatively, if they were truly targeted at mosques, their application to other religious places could not necessarily be justified.⁹⁷

Finally, two technical, but in practice extremely significant, areas of uncertainty were raised. First, defining a place of worship was recognized as problematic. Some traditions could recognize “any building, or even the open air,” as a “place of worship;”⁹⁸ others stressed spaces where knowledge was gained;⁹⁹ while others view a room in a private house as able to serve as a “place of worship.”¹⁰⁰ Some respondents assumed that the phrase meant public places of worship,¹⁰¹ but this was neither an explicit limit to the proposed powers, nor one anticipated by its proponents. Second, a number of respondents raised concerns about the question of control of a place of worship. It was noted that a religious body may lend space in its sacred place to other bodies, perhaps a different faith group seeking to shield their activities.¹⁰²

More significantly, because of the governmental structures of particular religious groups, the potential liability – which as previously discussed could amount to criminal liability – could extend very broadly. The United Reformed Church, for instance, could see liability applying to the “entire roll of members of a place of worship,”¹⁰³ while the Religious Society of Friends considered that “everyone present at a Meeting for Worship is responsible for that meeting, whether a member of the Society or a casual visitor.”¹⁰⁴ Some respondents feared that the new

⁹⁴ See, e.g., Anthea Cox, Co-Ordinating Secretary for Public Life and Social Justice, Methodist Church, Responses, *supra* note 77, at 27.

⁹⁵ See, e.g., Leah Granat, on behalf of the Scottish Council of Jewish Communities, Responses, *supra* note 77, at 65.

⁹⁶ Islamic Human Rights Commission, Responses, *supra* note 77, at 54.

⁹⁷ See, e.g., Rev. Francis Scott, Team Vicar, Parish of Huntingdon and New Earswick, York, Responses, *supra* note 77, at 30; Sukhvinder Singh, Sikh Federation, Responses, *supra* note 77, at 51.

⁹⁸ Richard Porter, Clerk, Religious Society of Friends (Quakers), Wincanton, Responses, *supra* note 77, at 63.

⁹⁹ See, e.g., Yousif Al-Khoei, Al-Khoei Foundation, Responses, *supra* note 77, at 83-4.

¹⁰⁰ See, e.g., Leah Granat, on behalf of the Scottish Council of Jewish Communities, Responses, *supra* note 77, at 66.

¹⁰¹ See, e.g., Ramesh Kallidai, Secretary General, Hindu Forum of Great Britain, Responses, *supra* note 77, at 134.

¹⁰² See, e.g., Alan Ruston, on behalf of the General Assembly of Unitarian and Free Christian Churches, Responses, *supra* note 77, at 19.

¹⁰³ Revs. Martin Camroux & Dr John Parry, United Reformed Church, Responses, *supra* note 77, at 36.

¹⁰⁴ Richard Porter, Clerk, Religious Society of Friends (Quakers), Wincanton, Responses, *supra* note 77, at 62.

power, and attached criminal liability, would either deter members of the community from becoming involved in management of places of worship,¹⁰⁵ or encourage trustees faced with a Requirement Order to resign en masse to avoid any fear of criminal liability.¹⁰⁶ It was also noted that some religious communities might have theological problems with exercising this sort of control by, for instance, excluding co-religionists from congregational prayers.¹⁰⁷

Overall, the response to the consultation was extremely negative. The range of groups who rejected the power was in itself telling—not only groups representing a significant number of places of worship themselves, but also local government officials, policing associations, and NGOs. Following the consultation, in December 2005, the Home Secretary, Charles Clarke, made a statement on the progress of counterterrorist measures following 7/7. He characterized the responses as favoring strengthening police and community partnerships, and because of “[t]his commitment to joint working and information sharing,” as well as other legislative and practical developments, stated that he “will not seek to legislate on this issue at the present time, although [he] will keep the matter under review.”¹⁰⁸

The consultation, discussed above, and collected responses can be seen as a vindication of an extensive consultation process, where clear proposals for clear changes to the law were opposed by a range of interested parties, resulted in the proposals eventually being dropped.¹⁰⁹ This did not, however, remove the power of sacred places from the agenda of the State. Two strategic alternatives to deal with the problem were pursued simultaneously.

The first was a clear government agenda to ensure, to the farthest extent possible without legal change, that existing powers are capable of being applied fully to mosques. The key example was government efforts to extend the reach of the Charity Commission, allowing its very extensive powers to be applied to mosques more widely without any need for formal legal change. The Commission has established a Faith and Social Cohesion Unit, “to identify and

¹⁰⁵ See, e.g., Councillors Imtiaz Ameen & Khalid Hussain, Councillors for Dewsbury and Bury, Responses, *supra* note 77, at 106; Sir Iqbal Sacranie, Muslim Council of Britain, Responses, *supra* note 77, at 122.

¹⁰⁶ Councillors Imtiaz Ameen & Khalid Hussain, Councillors for Dewsbury and Bury, Responses, *supra* note 77, at 108.

¹⁰⁷ See, e.g., Councillors Imtiaz Ameen & Khalid Hussain, Councillors for Dewsbury and Bury, Responses, *supra* note 77, at 108.

¹⁰⁸ Charles Clarke, Secretary of State for the Home Department, Statement before Parliament, Dec. 15, 2005, available at <http://press.homeoffice.gov.uk/Speeches/speeches-archive/15-12-05-st-ct-progress-report.html>.

¹⁰⁹ See *id.*

support organisations that could be but are not currently registered with the Commission,” and making Muslim charities its initial focus.¹¹⁰ In February 2009, the Commission published its survey on mosques in England and Wales,¹¹¹ claiming it was the largest of its kind.¹¹² Identifying the extent to which mosques lie outside of the jurisdiction of the Charity Commission seems likely to prove a preliminary step to reducing their number.

The second is a broader attempt to effect theological change in Islamic communities, promoting forms of Islam compatible with State values and inhibiting the growth of forms of Islam supportive of actions such as the 7/7 attacks. This is the subject of the remainder of this paper.

IV. DOES HER MAJESTY’S GOVERNMENT ‘DO’ THEOLOGY? A SOFTER APPROACH TO SACRED PLACES

Immediately after 7/7, then Prime Minister Tony Blair risked casting himself as an authority on Islamic theology, assuring the Islamic communities that “[w]e will work with you to make the moderate and *true* voice of Islam heard as it should be,”¹¹³ later contrasting that voice with that of “fanatics, attached to a completely *wrong* and reactionary view of Islam”,¹¹⁴ before going on to develop his own interfaith ecumenical vision through the Tony Blair Faith Foundation. It may be that this was simply a misstatement – that Blair’s concern was to reject a view of Muslims in general as supportive of terrorism in order to damp down threatening Islamophobia. Later government action, however, cannot be explained as anything other than State support for particular theological positions.¹¹⁵

Islamic community working groups were set up under Preventing Extremism Together. Group 5, considering Imams and the role of mosques, recommended a new national advisory

¹¹⁰ Charity Commission, *Survey of Mosques in England and Wales*, (Feb. 2009) at §1.1, available at <http://www.charity-commission.gov.uk/Library/tcc/pdfs/fscumosque.pdf>.

¹¹¹ *Id.*

¹¹² *Id.* at §2.0.

¹¹³ Tony Blair, U.K. Prime Minister, *Statement to Parliament on the London Bombings* (July 11, 2005) available at www.number10.gov.uk/page/7903 (emphasis added).

¹¹⁴ Tony Blair, *A Renaissance in Foreign Policy*, Los Angeles World Affairs Council (Aug. 1, 2006) available at <http://www.lawac.org/speech/2005-2006/Blair,%20Tony%202006.pdf> (emphasis added).

¹¹⁵ Unless, of course, we redefine religion to exclude the groups which are being opposed by the current State action, at which point the problem ceases to be that the State is supporting one theological stance over another, but that we have no sensible strategy for defining religion.

body of mosques and Imams, creation of continuous professional development programs for imams and mosque officials, and “[p]articular emphasis on developing skills around interfaith dialogue, youth work, counseling, management, communication, citizenship and English.”¹¹⁶ The Mosques and Imams National Advisory Board (MINAB) was launched in June 2006 as “an independent . . . community led initiative,”¹¹⁷ albeit one identified as an “integral part” of the U.K. counter-terrorism strategy (CONTEST), and one which has been reported as receiving substantial State funding.¹¹⁸ The government has also provided ongoing financial support for capacity building, and training of Imams through the Preventing Violent Extremism Community Leadership Fund, including, for instance, a course to equip newly qualified Imams to “engage with British culture and humanitarian values, and to find parallel values within the *Qur’an*.”¹¹⁹ Alongside support for particular theological stances within the U.K., the government also looks beyond its own borders to encourage particular forms of Islam through Foreign and Commonwealth Office’s projects under CONTEST which “challenge extremist ideology and support mainstream voices.”¹²⁰ I will not consider this outward looking policy at length, as there may be grounds for distinguishing between supporting religions within the jurisdiction, and abroad,¹²¹ but it is noteworthy that one recipient of funds to do this, Maajid Nawaz of Quilliam, explained that:

Our long term ambition is to be fully independent of government. I would also emphasise here though, at this stage, that I don’t think there is anything besides the perception problems, which of course pose real strategic concerns, I don’t think that intellectually there is anything wrong with governments providing grants to secure their country.¹²²

¹¹⁶ Working Together, *Preventing Extremism Together*, 69 (Aug. -Oct. 2005), available at <http://www.communities.gov.uk/documents/communities/pdf/152164.pdf>.

¹¹⁷ See Press Release, Mosquest and Imams National Advicsory Board, The MINAB Launch, available at <http://www.minab.org.uk/news/press-releases/84-the-minab-launch> (last visited Mar. 15, 2009).

¹¹⁸ Inayat Bunglawala, *Minab: Community Initiative, or Quango?*, GUARDIAN ONLINE, May 15, 2009, available at <http://www.guardian.co.uk/commentisfree/belief/2009/may/15/minab-mosques-imams-islam>.

¹¹⁹ Sadia Khan, *House of Commons Daily Hansard Written Answers*, col. 236W, Jan. 12, 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090112/text/90112w0050.htm> (emphasis added).

¹²⁰ Foreign Commonwealth Office, Preventing Extremism, <http://www.fco.gov.uk/en/fco-in-action/counter-terrorism/counter-terrorism/preventing-extremism/> (last visited June 19, 2009).

¹²¹ See generally, Jessica Powley Hayden, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171 (2006).

¹²² Interview by Radio 4 with Maajid Nawaz, June 23, 2009 (on file with author).

V. IS THERE ANYTHING WRONG WITH THE GOVERNMENT GOING THEOLOGY? AN EVALUATION OF THE USE OF SOFTER STRATEGY

At first glance, this use of “soft power” to tame problematic sacred places seems preferable to the formal legal regulation considered in 2005. By seeking to modify the way in which communities choose to act rather than seeking to curb their actions, direct conflict with the right to manifest religion communally is to some extent avoided. Certainly, direct conflict with supporters of religious rights is reduced. Additionally, such soft power may prove to be an effective way of protecting the fundamental rights of others. So, is there anything intellectually wrong with the U.K. government giving grants to favor one particular theological outcome?

One possible objection is that it is contrary to the international obligations of the U.K., particularly in relation to the ECHR. The separation of religious organizations and the State has never been as central to religious rights jurisprudence under the ECHR as it has been to, say, the First Amendment to the United States Constitution. However, recent case law may be developing a strong emphasis on the autonomy of religious organizations on the basis of Articles 9 and 11, and the rejection of some forms of relationships with the State on the basis of these Articles read with Article 14.¹²³ This can be seen in the recent decision of the European Court of Human Rights in *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, where the Court unanimously asserted that:

[t]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. Were the organisational life of the religious community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.¹²⁴

State action to resolve a leadership dispute in a divided community by assisting one of the opposing groups to gain full control was found to violate Article 9. As tellingly, “the State

¹²³ See ECHR, *supra* note 89, at arts. 9, 11, and 14.

¹²⁴ *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, App. No. 412/03 and 2009 Eur. Ct. H.R., ¶ 103 (January 22, 2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs.”¹²⁵

Despite the possibilities of an ECHR/HRA challenge, this is not my central criticism. I am more concerned that, not only is an establishment being introduced without proper, explicit consideration of what is being done, but it is of a kind which is so sweeping as to constitute an unacceptable diminishing of the separation between the proper spheres of religion and State.

VI. THE CREEPING ESTABLISHMENT OF AN ANGLICAN ISLAM

I have argued elsewhere that a useful legal definition of establishment is: “there are laws which apply to that particular religious organisation, *qua* that religious organisation, which do not apply to the majority of other religious organisations.”¹²⁶ One key characteristic of the exercise of soft power described above is that it does not involve the creation of new laws, or even the application of generally applicable laws in a new way. This legal definition does not, then, apply directly to our current discussion. It does, however, raise the possibility of multiple establishments. If I can shift the discussion from hard law to soft law, multiple religious organisations can be in special relationships with the state, and so in that sense – perhaps a more commonly used sense than my definition above – become an established religion. What consequences might we expect to flow from the State adopting a special relationship such as that adopted with State compatible forms of Islam as outlined above?

Perhaps surprisingly, a useful source here is the First Amendment to the United States Constitution. The First Amendment is deceptively brief: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

¹²⁵ *Religionsgemeinschaft Der Zeugen Jehovahs v. Austria*, Apps. Nos. 40825/98 and 35677/04, 2008 Eur. Ct. H.R., ¶ 97 (July 31, 2008) (Chamber), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number); *Verein der Freude der Christengemeinschaft v. Austria*, App. No. 76581/01, 2009 Eur. Ct. H.R., ¶ 97 (Feb. 26, 2009) (Chamber), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number); *Gutl v. Austria*, App. No. 49686/99, 2009 Eur. Ct. H.R., ¶ 38 (Mar. 12, 2009) (Chamber), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

¹²⁶ Peter W. Edge, *Reorienting the Establishment Debate: From the Illusory Norm to Equality of Respect*, 27 *ANGLO-AM. L. REV.* 265 (1998).

government for a redress of grievances.”¹²⁷ The religion clause, as it is commonly referred to, constitutes on its face, a restriction on the power of the U.S. Congress, and so of the federal authorities. It was unable to make a law “respecting an establishment of religion;” or “prohibiting the free exercise” of religion.¹²⁸ Secondly, the clause gives no guidance on what is meant by “establishment,” “free exercise,” or “religion.” For instance, Witte is confident that the establishment bar meant that the most dangerous part of the national government could not prescribe a national religion.¹²⁹ But what of less extreme State action – could the national Government take action which promoted all religions equally? Were the individual states free to support a particular religion over others? Could Congress confirm existing laws dealing with religion, even if they would be beyond its power *ab initio*? The sixteen words of the religion clause have generated a considerable amount of case law, and a vast body of academic literature, with nearly 2,000 legal articles on religious liberty jurisprudence in the United States being published between 2000 and 2004 alone.¹³⁰

The First Amendment is generally understood as having two religion clauses – the Free Exercise Clause, protecting the exercise of religion, and the Establishment Clause, prohibiting certain forms of relationship between religious organizations and communities and the State. The Free Exercise Clause has been singularly influential globally. The Establishment Clause, reflecting as it does a particular set of visions about Church/State relations which had an unusual demographic, as well as historical, origin, has travelled less well. In considering whether a particular example of State action is unconstitutional under this clause, however, the Supreme Court has generated important reflections on how a special relationship between a religion and the State might be expected to function. In the U.S. constitutional context, of course, this impact is used as the basis for a finding of unconstitutionality; but the reflections might help us understand what the establishment of Anglican Islam might do in the context of counter-terrorism.

¹²⁷ U.S. CONST. amend. I.

¹²⁸ *Id.*

¹²⁹ John Witte, Jr., *Religion and the American Constitutional Experiment 90-91 (“ACE”)* (2nd ed., Westview Press 2005).

¹³⁰ *Id.* at xvi.

One objection to State support for a particular religion is that it costs money. Such State money comes primarily from the taxpayer, and as Chemerinsky argues, “[i]t is wrong to make people support a church that teaches that their religion or beliefs are evil. It violates their freedom of conscience and forces them to support religions that they do not accept.”¹³¹ It is a safe assumption that very few taxpayers would rather have financial support from taxes given to 7/7-supporting Islamic communities than 7/7-rejecting Islamic communities. It is less safe, however, to assume that only a small number of tax payers would object to taxes being used to support Islam at all. Yet, this argument has limited traction in the U.K. context. In the context of the ECHR, arguments against paying taxes which will be used for purposes to which the taxpayer objects on conscientious grounds have been singularly unsuccessful.¹³²

A second objection is based not on fiscal grounds, but on endorsement. In the U.S. context, it has been argued that the simple fact of official endorsement for a particular religion is an unconstitutional harm. As Justice O’Connor stated in *Lynch v Donnelly*, “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders.”¹³³ Is this not, however, exactly the message the government wishes to send through its support of some forms of Islam? It is keen to distinguish, and to be seen to distinguish, between Muslims who are full members of the political community – included and indeed welcomed in acting to protect that community – and other Muslims, who are not, but who can become so by changing their religious views to accord with the insider group.

Third, and a slightly older line of authorities, the U.S. Supreme Court has on occasion analyzed Church/State relations against a wall of separation. In the classic case of *Lemon v. Kurtzman*, the Supreme Court articulated a three-stage test for violation of this wall. State action could violate the Establishment Clause (1) if the purpose of the State action was to aid or promote religion; (2) the primary effect of the action was to aid or promote religion; or (3) the result of the action is excessive entanglement with religion.¹³⁴ The Supreme Court has tended to

¹³¹ Erwin Chemerinsky, *Why separate Church and State?*, 85 OR. L. REV. 351, 361 (2006).

¹³² See, e.g., *C v. United Kingdom*, 37 DR 142 (Eur. Cmm’n H.R. 1983).

¹³³ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

¹³⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

either ignore *Lemon* or impose extreme modifications, but it has not overruled *Lemon*, despite opportunities to do so.¹³⁵ Elsewhere, I have been particularly attracted by the entanglement prong of *Lemon*,¹³⁶ but I think there is a strong case for seeing the current scenario as falling under the comparatively little discussed first prong of *Lemon*. It may be argued with considerable strength that the U.K. government is not theologically motivated in its support for particular forms of Islam. It may not, however, be convincingly argued that the purpose of the State is not to promote these forms, for all that the promotion is a means to an end. The government may defend its actions to the public as not being concerned with doctrinal change, but rather with disseminating a different set of values. However, that is not what is being said to the communities of faith. If hypocrisy is to be avoided, the goal of doctrinal change must be accepted. In other words, there is an important distinction between arguing that a particular Islamic community is incompatible with international human rights or the fundamental ideology of the United Kingdom State, and arguing that it is unIslamic.¹³⁷

Finally, and returning for a moment to the question of finances, an objection to State support for religion is that, in some way, the State will ask for a quid pro quo for this support. As Chemerinsky puts it:

the Establishment Clause protects religion from the government. If the government provides assistance, inescapably there are and should be conditions attached. For example, when the government gives money, it must make sure that the funds are used for their intended purpose. This necessarily involves the government placing conditions on the funds and monitoring how they are spent. Such government entanglement is a threat to religion.¹³⁸

Entanglement may be seen as the principle objection to a special relationship between the State and particular religions. The entanglement here is particularly pronounced. It will be

¹³⁵ See also Genevieve Deppe, *Not a Prayer in Protecting the Reasonable Observer: Borden Shows the Endorsement Test is Just Not Working*, available at http://works.bepress.com/genevieve_deppe/1 (last visited July 6, 2009).

¹³⁶ PETER W. EDGE, *RELIGION AND LAW: AN INTRODUCTION* 97 (Ashgate Publishing 2002); see also Peter Cumper & Peter W. Edge, *Muslims, Counter-terrorism and Human Rights in the United Kingdom*, in *RETHINKING GLOBAL TERRORISM* (N.S. Basic & A.H. Siddiqui, eds., Int'l Islamic Univ. Press 2009).

¹³⁷ This distinction is not always made. See, e.g., Zeyno Baran, *Fighting the War of Ideas*, 84(6) *FOREIGN AFFAIRS* 68, 72 (Nov./Dec. 2005).

¹³⁸ Chemerinsky, *supra* note 131, at 364.

recalled that State resources are being used to effect theological change in the target religions. Even the Church of England does not, now, accept that the State can legitimately resolve theological issues within the Church.¹³⁹ So, for instance, we could expect considerable resistance to a decision by the government to channel resources and State support to a group within the Church of England favoring an identical theological construction of same-sex and opposite-sex sexual relationships. This connects with the deeper idea of voluntarism, which Esbeck describes as:

where religion is supported voluntarily by those in the private sector—which is to say, not by the government. Voluntarism goes well beyond prohibiting attempts by government to force religious belief on individuals or to coerce religiously informed conscience. Voluntarism is about rejecting active government support for religion, whether or not that support results in coercion.¹⁴⁰

Moving perhaps a little broader, we can follow Luhmann in seeing this separation as helping to guarantee the differentiation of society in several relatively autonomous social spheres, thereby serving as a barrier towards totalitarian tendencies.¹⁴¹ In other words, it is not part of the State's business to resolve theological issues by deciding that some religions should be promoted, particularly when in doing so, it decides that other religions should not be promoted.

VII. CONCLUSION

Sacred places are powerful places, but they can act as foci of State control over religious communities and organizations which are seen as a threat. In the wake of 7/7, the U.K. government sought to engage with what it perceived as dangerous manifestations of religion with concrete proposals for hard law powers. These proposals were engaged with on the basis of explicit arguments about the free exercise of religious rights, and the autonomy of religious

¹³⁹ For a recent review of the issue, see Mark Hill, *Editorial*, 9 *ECCLESIASTICAL L.J.* 1 (2007); Stephen Slack, *Church Autonomy and the Civil Partnership Act: A Rejoinder*, 9 *ECCLESIASTICAL L.J.* 206 (May 2007); and Malcolm Jones, *Constitutional Conventions: A Rejoinder Rebutted* 9 *ECCLESIASTICAL L. J.* 304 (Sept. 2007).

¹⁴⁰ Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 *W. VA. L. REV.* 359, 369 (2008).

¹⁴¹ See also Karl-Heinz Ladeur & Ino Augsberg, *The Myth of the Neutral State: The Relationship Between State and Religion in the Face of New Challenges*, 8 *GERMAN L.J.* 143, 146 (2007).

organizations. Frank proposals for restriction led to a nuanced consideration of the impact of these proposals, and their failure.

Instead, however, the government has shifted to the exercise of soft power to affect theological change in the communities whose sacred places it had sought to control. These actions have not been subject to anything like the level of discussion of the hard law proposals. They seem, however, to be moving towards a position where some forms of Islam are not only established in the U.K., but established with a level of intrusion of the State into theology not seen here for a number of centuries. This is an unacceptable entanglement of State power and religion, even in the context of contemporary terrorist threats.