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Conflations and gaps. A response to Nicholas Wolterstorff's 'toleration, justice, and dignity'

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This contribution responds to Nicholas Wolterstorff's argument for religious toleration and freedom of religion respectively that he develops in his paper 'Toleration, justice and dignity'. I argue that Wolterstorff conflates religious toleration and the right to freedom of religion, which has problematic implications. Moreover, I reveal gaps in his justification of the special worth or dignity of human persons, and, derived from this, freedom of religion.

Keywords: Wolterstorff; religious toleration; freedom of religion

Nicholas Wolterstorff's paper 'Toleration, justice and dignity' attempts to provide an argument for a specific form of religious toleration, namely the 'natural right to toleration of one's religion in the form of government allowing one to exercise one's religion freely'.¹ In my response to Wolterstorff's paper I want to address two parts of his argument. My first comment concerns his use of the concepts religious toleration on the one hand and freedom of religion on the other. Here, I argue that Wolterstorff conflates religious toleration and the right to freedom of religion, which has problematic implications. My second comment consists of a set of two (critical) remarks concerning Wolterstorff's justification of the special worth or dignity of human persons, and, derived from this, freedom of religion.

1. Religious toleration and/or freedom of religion

Wolterstorff conceptualizes religious toleration as putting up with somebody's religious beliefs and practices that the person who tolerates dislikes or disapproves of. In other words, it is essential for toleration that the belief or practice that is tolerated is in one way or the other considered objectionable, wrong or bad. This 'objection component'² is part and parcel of toleration; without it we could speak of indifference or appreciation, both of which differ from toleration in important respects. This part of Wolterstorff's definition is in line with dominant liberal conceptualizations of toleration.³ It is noteworthy, however, that Wolterstorff doesn't conceptually distinguish religious toleration from the right to freedom of religion, but understands the latter as a specific form of religious toleration, on which he focuses in his paper, namely religious toleration in 'the form of the government granting you free exercise of your religion.'⁴ In so doing, Wolterstorff construes the state and the government respectively as putting up with, but also as disapproving of religion, be it religion in general or particular

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religious beliefs and practices. In other words, the state is understood in Wolterstorff's argumentation as explicitly taking a negative judgmental stance to (particular) religions. This is at least in tension with interpretations of freedom of religion, according to which the right to religious liberty is – unlike toleration – inextricably linked with equality and non-discrimination, which requires the state to operate in a non-discriminatory manner in matters of religion.⁵ This is very clear in the formulation of the First Amendment to the constitution of the U.S.A. to which Wolterstorff refers (in my view incorrectly) as an example of governmental *toleration*: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'⁶

One could object against my criticism of Wolterstorff's conflation of religious toleration and freedom of religion that freedom of religion and religious toleration can easily go together on the level of state politics if one construes the principles of equality and non-discrimination as merely requiring the state not to formally implement its disapproval of religion and particular religions respectively by means of legal regulation. A state could legally allow all citizens to exercise their religion, and at the same time state institutions, including the government, could take up a negative stance on one or several particular religions or forms of religious subjectivity, and act upon it in settings and practices that are not legally regulated as far as religion is concerned. A government could, for example, informally express its appreciation of 'liberal' forms of religion by inviting their religious leaders to important commissions etc. but not those of more traditional or countercultural religious groups.⁷ In fact, this may describe the real international politics of religious freedom much better than the idea of an ostensibly 'religiously neutral' state.⁸ However, recent debates about a 'Judeo-Christian culture' in Europe, the Swiss ban on minarets, or the (in)famous Lautsi case illustrate very clearly that such cases cannot be adequately treated with reference to religious toleration.⁹ The issue of such controversies is not merely the question whether or not religious people should be allowed to practice their religion even if this requires legal exemptions from otherwise valid rules (ritual slaughter is a well-known example thereof); rather, such controversies concern the character of the shared public space and the society itself. Some strategies of religious accommodation (like allowing ritual slaughter) are consistent with religious toleration including its objection component, and they may suffice to ensure one of the essential aims of freedom of religion, namely to allow people to choose and practice their religion freely without coercion by the state, church, or other institutions. However, as soon as the state applies religious toleration to the second type of cases, it is bound to take side with one (form of) religion, and not others, since the claims of different religious or non-religious groups about shaping the public space that all parties have to share often rival with each other. Accordingly, a second important aim of freedom of religion cannot be achieved, namely 'the creation of a polity in which one's economic, civil, legal, or political status is unaffected by one's religious beliefs.'¹⁰ It may be ambitious for a state to prevent the creation of 'second class citizens' whose religion is construed as 'foreign' or 'minority' and to aspire towards the inclusion of members of various religions as fully recognized citizens. It is, however, an implication of a robust conception of freedom of religion to direct politics in this way. Religious toleration doesn't do this, and this is why Wolterstorff's conflation of religious toleration and freedom of religion hampers thorough political philosophical analyses of religious diversity rather than that it would provide a justification of a fundamental normative principle of liberal and religiously diverse societies.

In the remainder of this paper, I will use the term freedom of religion without distinguishing it from religious toleration, because the distinction doesn't affect my criticism of Wolterstorff's justification strategy.

2. Wolterstorff's justification of dignity and freedom of religion

Wolterstorff attempts to justify freedom of religion as a natural right that is grounded in the worth or dignity of the rights-holder.¹¹ His justification strategy can be reconstructed very roughly in two parts. First, Wolterstorff identifies two aspects of the human person that he considers directly relevant to 'the natural right to the free exercise of religion',¹² namely the capacity to interpret reality and one's place therein, and the capacity to form a valorized identity. Human persons, Wolterstorff asserts, have great worth on account of possessing these capacities. The second part of the argument says that religions represent a remarkable exercise of these two capacities, and because of this persons who possess these capacities not only have great worth on that account, but they also have a natural right to be treated in ways that befit that worth – and according to Wolterstorff, this will 'quite obviously' include having the civil right to free exercise of their religion.¹³

Although this reconstruction of Wolterstorff's argument is admittedly rough, it provides sufficient possibilities for comments and critical questions. Let me address two parts that I consider especially noteworthy (1), and in need of further clarification (2), respectively.

2.1. Freedom of religion as a right of persons, not a human right

Wolterstorff bases the special worth and dignity, in which the right to freedom of religion is grounded, on specific capacities that he ascribes to human persons, not to human beings in general. The argument cannot show that people who don't possess these capacities (e.g. small children, or people in permanent coma) do also have such special worth. Accordingly, Wolterstorff conceptualizes freedom of religion not as a human right, but as a natural right of persons; all human persons, and only human persons have the capacity to interpret reality and their place therein, and the capacity to form a valorized identity. These capacities, Wolterstorff argues, make human persons and only human persons especially worthy, and freedom of religion is grounded in this worth. If the argument is sound (see below), it justifies the right to freedom of religion only for human persons, not for other humans such as small children. This isn't problematic as long as one understands religion as a practice that depends on capacities such as those outlined by Nicholas Wolterstorff, since every human being will have the right to freedom of religion as soon as he or she is able to make use of it. And actually, such an account is consistent with the UN Convention on the Rights of the Child that states in Article 14 that state parties shall respect the right of the child to freedom of thought, conscience and religion, but qualifies this right by requiring state parties to 'respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.' It is noteworthy, however, since the dependency of freedom of religion on specific capacities of persons poses challenges to the inclusion of religions that do not easily accord with an understanding of religion in the sense of Thomas Nagel's 'religious temperament', which almost exclusively emphasizes beliefs and cognitive aspects of religion, and disregards other dimensions of religion, such as embodied beliefs, almost entirely.

2.2. *Why do human persons have great worth on account of specific capacities?*

A closer look at Wolterstorff's argument reveals that this question cannot be answered easily. Having described the capacity to interpret reality and one's place therein, and the capacity to form a valorized identity Wolterstorff asserts that if he (!) takes note of these capacities, and reflects upon them, he finds them 'remarkable, amazing'. Please notice that he uses the first person singular, here: 'I [Nicholas Wolterstorff] find it [the capacity] remarkable, amazing.'¹⁴ Later, however, he continues as follows: 'I have stressed that these two capacities *are* amazing.' Here, Wolterstorff does not use the first person singular, but simply asserts the amazingness of the capacities *as a matter of fact*. And even more, he asserts that human persons are remarkable and amazing on account of possessing these capacities, and that means, according to Wolterstorff, that human persons have great worth, are precious, and have dignity. So, to put it a bit polemically, the argument seems to say that somebody or something has great worth because of the fact that somebody (Nicholas Wolterstorff) finds it amazing – all the rest follows as it were by implication. I do understand that Wolterstorff doesn't want to argue that the simple fact that he or some other person finds something remarkable and amazing bestows special worth on somebody or something.¹⁵ But there is a missing link that justifies the leap from a personal experience of somebody ('somebody experiences something X as amazing') to a normative statement that claims to be valid for other people, as well ('X has special worth or dignity and deserves to be protected'). Without further clarification, this missing link knocks down Wolterstorff's strategy to justify the right to freedom of religion with reference to the capacities to interpret reality and one's place therein, and to form a valorized identity.

Notes

1. Wolterstorff, "Toleration, Justice and Dignity," 381.
2. Forst, *Toleration in Conflict*, 18.
3. See, e.g., Forst, *Toleration in Conflict* and Galeotti, *Toleration as Recognition*.
4. Wolterstorff, "Toleration, Justice and Dignity," 381.
5. See Bielefeldt, "Freedom of Religion or Belief," and Ceva, "Why Toleration is not the Appropriate Response."
6. Wolterstorff, "Toleration, Justice and Dignity," 379.
7. I borrow the concept of countercultural religious groups from S.E. Mumford who characterizes such groups as groups that define themselves in terms of separateness and distinctiveness. See Mumford, "The Judicial Resolution".
8. See Winnifred Faller Sullivan's influential book *The Impossibility of Religious Freedom*, contributions in Sullivan e.a. *Politics of Religious Freedom*, and the recent works of Hurd, *Beyond Religious Freedom* and Mahmood, *Religious Difference in a Secular Age*.
9. On the Lautsi case see Tempermann, *The Lautsi Papers*, an analysis of the Swiss ban on minarets in the light of a 'liberal nationalism' is provided by Miller, "Majorities and Minarets". For the construction of the concept of a Judeo-Christian culture see Hemel, "(Pro)Claiming Tradition".
10. Mahmood, "Religious Freedom," 418.
11. Wolterstorff, "Toleration, Justice and Dignity," 381.
12. *Ibid.*, 389.
13. *Ibid.*, 384.
14. *Ibid.*, 383.
15. On bestowed worth see Wolterstorff, *Justice*, 357.

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