

RELIGIOUS LIBERTY INITIATIVES

Preserving the “First Freedom” at Home and Abroad

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Hannah Clayson Smith, then senior counsel at the Becket Fund for Religious Liberty, presented this essay at “The Erosion of Religious Liberties—Impact on the International Church,” the International Society’s twenty-second annual conference, April 2011, Brigham Young University, Provo, Utah.

For those unfamiliar with the Becket Fund for Religious Liberty,¹ allow me to tell you a little bit about who we are. The remainder of this presentation will be “a view from the trenches” of our current cases that defend this vitally important freedom.

The Becket Fund is a public interest law firm based in Washington, DC, that protects the free expression of all religious faiths. We have a fifteen-year record of defending religious liberty for all people, including Buddhists, Christians, Hindus, Jews, Native Americans, Sikhs, Muslims, and Zoroastrians. The Becket Fund works in the courts of law, courts of public opinion, and the academy. We do work both domestically and internationally. The Becket Fund was founded by a devout Catholic, and the people who work there represent a spectrum of religions. It is a wonderful place to work with colleagues of many different faiths.

I want to quote to you from an address given by Elder Dallin H. Oaks exactly two months ago at Chapman University in California:

It is imperative that those of us who believe in God and in the reality of right and wrong unite more effectively to protect our religious freedoms to preach and practice our faith in God and the principles of right and wrong He has established. . . .

All that is necessary for unity and a broad coalition along the lines I am suggesting is a common belief that there is right and wrong in human behavior that has been established by a Supreme Being. All who believe in that fundamental should unite more effectively to preserve and to strengthen the freedom to advocate and practice our religious beliefs, whatever they are. We must walk together for a ways on the same path in order to secure our freedom to pursue our separate ways when that is necessary according to our own belief.²

I believe that the work that we do at the Becket Fund answers that eloquent call.

I was asked to speak today about the various initiatives we work on at the Becket Fund. I'll provide an overview of trends and issues and several pending cases we are engaged in to illustrate some of the current assaults on religious liberty in this country and abroad.

First, I want to give you some domestic trends. As we began 2011, we saw a lot of commentary about important developments for religious liberty over the past decade. Some of these, particularly here at home in the United States, include (1) a partnership and development of social programs between government and faith-based institutions begun under President George W. Bush and continued by President Obama, (2) the rise in anti-Muslim sentiment in America post-9/11, (3) the fight over marriage for same-sex partners, and (4) the rise of secularist organizations like Secular Coalition for America and the Freedom from Religion Foundation, which attempt to undermine the religious pillars of our culture and society.

As we look ahead, there are several trends to watch for in the coming year, including (1) battles over policies prohibiting discrimination on the

basis of sexual orientation and the extent to which religious organizations are exempt from such policies and (2) the continued debate over conscience-clause issues in the healthcare arena, especially with the passage of the new healthcare law. How much room is there for people of faith to conscientiously object to some of the new mandates? I turn now to some of the current cases.

RELIGIOUS AUTONOMY

The first theme I want to address is religious autonomy for churches. One of the most exciting developments happened in March 2011, as the Supreme Court agreed to hear a case involving the ministerial exception.³ On the side of the religious organization at issue, the Becket Fund is counsel in the case, with Professor Doug Laycock of the University of Virginia as lead counsel. The ministerial exception is a doctrine that is derived from the First Amendment that prohibits courts from reviewing firing and hiring decisions from religious institutions involving their ministerial employees. The question is, who counts as a ministerial employee?

In that case, a Lutheran church in Michigan operates a religious school. The school's purpose is to provide a Christ-centered education based on biblical principles. The church dismissed a teacher (who had the title of a commissioned minister within the Lutheran Church) for insubordination and disruptive conduct in violation of the church's teachings. The teacher sued and asked the court to reinstate her. The Michigan federal district court ruled in the church's favor.⁴ It held that the teacher's claim could not proceed because she was a licensed minister and led students in prayer, worship, and religious studies, which the court found was enough for her to fall under the ministerial exception. Not so, said the US Court of Appeals for the Sixth Circuit when it reversed and held that the teacher could pursue the claim.⁵ Because she spent more minutes of the day on secular subjects than on religious ones, the ministerial exception did not apply. The test they used was focused on time: How many minutes of the day did the teacher spend teaching math or teaching reading?

We filed a petition for certiorari, asking the US Supreme Court to review the case with the scope of the ministerial exception at issue. This will be a landmark case. It is the first time the Supreme Court has heard

arguments in a ministerial exception case. It will likely be of great significance to any religious organization that hires and fires people based on religious preferences. On a similar note, in September 2010, The Church of Jesus Christ of Latter-day Saints had a case before the European Court of Human Rights involving a public affairs director for the Church in Europe. That employee committed adultery, lost his temple recommend, and was fired. In the ensuing legal battle, the court held for the Church.⁶ While this case was obviously decided in a different legal system than ours, we are optimistic the Supreme Court will recognize this fundamental right derived from the First Amendment of churches to decide who to hire and who to fire.

Another issue under the theme of religious autonomy relates to religious hiring preferences by faith-based organizations competing for federal grant awards. I mentioned before the relationship between the federal government and faith-based organizations in social welfare programs. The Justice Department is now “debating whether to reinterpret federal law so as to allow discrimination, when awarding federal grants, against faith-based organizations who engage in . . . religious hiring preferences.”⁷ During the Bush administration, the Department of Justice’s Office of Legal Counsel (OLC) analyzed this issue. It determined the protection of religious exercise in the federal Religious Freedom Restoration Act (RFRA) is “reasonably construed to apply to religious organizations that accept federal grants,”⁸ and “because requiring a religious organization to abandon its religious practice in order to receive a federal grant is a substantial burden on religious exercise, the government may not force a religious organization to abide by the non-discrimination rules as a condition of receiving a grant.”⁹ After President Obama was elected, various groups urged his administration to rescind this opinion and narrow the scope of RFRA’s protection. This is an ongoing matter and one that would have a great impact on religious organizations who engage in preferential hiring, who want to engage in social welfare programs, and who want to receive federal grants to help them do so.

CONSCIENTIOUS OBJECTION

The second category of cases I'd like to discuss is conscientious objection. Our country has a long history of conscientious objection, including the refusal of eighteenth-century Quakers to bear arms¹⁰ and the conscientious objection of twentieth-century Jehovah's Witnesses to pledge allegiance to the American flag.¹¹ We have long recognized that the government should not force people to choose between their livelihood and their religion.

We're working on several cases in this category: (1) an Amish group in the Northeast threatened by state prosecution for violating fire codes by not installing battery-operated smoke detectors because of their religious belief against using batteries and (2) in the Sixth Circuit, an MA student who was kicked out of her counseling program right before graduation because she objected on religious grounds to counseling homosexual couples in a way that approved of their conduct.

Perhaps the greatest potential area for concern in this category is in health care, particularly as our country deals with the new healthcare legislation. We represent a family-owned pharmacy called Ralph's Thriftway and two pharmacists who refuse to dispense Plan B contraceptives, also known as the "abortion pill" because it can destroy a fertilized egg, and they believe life begins at the moment of fertilization.¹² The outcome of this case could force these two pharmacists out of their professions solely because of their religious beliefs.

Let me give you some background. In 2006, the Washington State Board of Pharmacy unanimously supported a rule protecting conscience for pharmacy workers. The board voted to allow pharmacists with religious objections to refrain from dispensing Plan B and instead to refer people to other nearby dispensers—a very reasonable position. The board recognized the sincerely held religious beliefs of the pharmacists and essentially said to the pharmacists, "If you don't want to dispense this, then as long as you give customers adequate notice where they can find this contraception at another nearby pharmacy, it's okay." Things soon turned ugly, however, and the board reversed course. The board admitted it found no evidence that anyone in the state had been unable to obtain medication due to the religious objection of a pharmacist. Notwithstanding that lack of evidence, the board issued a regulation requiring the pharmacists to

stock and dispense medication even when doing so violated their conscience. The two pharmacists sued to prevent the new regulation from forcing them out of their profession. They argued that forcing pharmacists to dispense Plan B contrary to their religiously held belief violated their constitutional right to the free exercise of their religion. The case is now poised for trial November 2011 and will set an important precedent.

Of course, this case has broader implications beyond pharmacists. It could potentially extend to all healthcare workers who object to performing abortions, who object to performing in vitro fertilization for same-sex couples, who object to providing sterilization, and who object to providing similarly morally troubling procedures. This is a very significant issue.

The second case under this category of conscientious objection deals with a religious university's right to refuse to provide contraceptive and abortion coverage in its employee insurance plan to remain true to that university's religious teachings.¹³ Some background in this case: Belmont Abbey College is a small Roman Catholic liberal arts college in North Carolina. In December 2007, it removed coverage for abortion, contraception, and voluntary sterilization from its insurance plan after learning that coverage had been included accidentally in its plan. Several faculty members filed complaints of gender discrimination with the EEOC. In March 2009, the EEOC initially concluded there was no evidence of such discrimination. Just weeks later, the EEOC (presumably at the direction of the incoming Obama administration) rescinded that decision. Several months later, the EEOC issued a contrary decision. It reasoned that "by denying prescription contraceptive drugs, [Belmont Abbey College] is discriminating based on gender because only females take oral contraceptives. By denying coverage, men are not affected, only women."¹⁴ The Becket Fund stepped up to defend Belmont Abbey's cause, joining its legal team and exposing the EEOC's actions in the press. We announced that because the EEOC's position is a direct assault on the principle of conscientious objection, we will resist it vigorously. The ball is now in the EEOC's court as it decides whether it will sue the college or not.

DEFAMATION OF RELIGION

Generally speaking, the “defamation of religion” agenda is an attempt, mostly by Islamic countries, to enshrine blasphemy laws in international human rights organizations. Such laws are commonly found in Pakistan, Saudi Arabia, and Iran to shield these Islamic states in their often violent attempts to silence religious minorities in their countries. In March of 2011 in the *National Review*, Nina Shea wrote about the anti-blasphemy measures in the UN.¹⁵ I will attempt to summarize the efforts in the UN and how these anti-blasphemy laws play out in Islamic countries around the world.

Initiatives to oppose the so-called “defamation of religion” in UN human rights bodies followed the 1989 fatwa by Ayatollah Khomeini calling on Muslims to kill Salman Rushdie for his book *The Satanic Verses*.¹⁶ The Organization of the Islamic Conference (OIC) is an organization of about fifty-six Muslim member states that seeks to impose on the UN the principle that “Western law should be subject to Muslim initiatives against apostasy and blasphemy.”¹⁷ It introduced annual UN resolutions on the issue. In 2005 and 2006, the resolution sponsors were emboldened by the incident involving the cartoons of Mohammed in Danish publications. Pakistan crafted the resolution carefully to appeal to Western liberal and multicultural sensibilities: “Unrestricted and disrespectful freedom of opinion creates hatred and is contrary to the spirit of peaceful dialogue and promotion of multiculturalism.”¹⁸

Western states began to resist these resolutions in 2001, and by 2007 support within the UN Human Rights Council had greatly eroded. By 2010, the council passed the resolution by only a narrow margin, and this year the OIC didn’t even introduce the resolution. The shift in the West is largely thanks to the Bush administration’s lead in defending free speech. That lead has been joined by a large coalition including the EU, the US Commission on International Religious Freedom, members of the US Congress, and NGOs like the Becket Fund that lobbied vigorously against the defamation of religion resolution.¹⁹ In 2011, instead of the usual defamation resolution, the UN Human Rights Council adopted one denouncing religious discrimination and violence but did not call for restrictions on free speech.²⁰ The change largely occurred at the urging of the Obama

administration, which advocated “more speech” as the antidote for offensive expression.²¹

Notwithstanding the victory at the UN level, we continue to see blasphemy laws in individual Muslim countries applied to persecute members of minority religious faiths or those who defend them. Let me give you a couple of examples. In Indonesia, the world’s most populous Muslim country, the government uses its forty-five-year-old blasphemy law—which was recently upheld against constitutional attack despite the strenuous efforts of Cole Durham and various NGOs around the world—to outlaw outright the religious groups that are not among the six officially sanctioned faiths in that country: Islam, Buddhism, Hinduism, Catholicism, Protestantism, and Confucianism.²² That law had also been used to justify violent attacks against minority religious groups. In Pakistan in March 2011, the national minister of minorities, Shahbaz Bhatti, was murdered because he opposed his country’s blasphemy laws.²³ This followed the assassination for the same reason of another high government official—Salman Taseer, governor of Punjab—and of a Christian mother of five whom Taseer had defended against charges of blasphemy and who was sentenced to death.²⁴ Similarly, a Pakistani youth has been arrested on blasphemy charges for statements he made in a school exam paper.²⁵ Police have refused to disclose what he wrote, arguing that repeating his statement would itself be blasphemy.²⁶ Islamic blasphemy laws and other defamation-of-religion initiatives remain a major human rights issue around the world.

RELIGION IN THE PUBLIC SQUARE

The fourth theme I want to cover is religion in the public square, specifically the Pledge of Allegiance cases. The Becket Fund defended the constitutionality of the words “under God” in the Pledge of Allegiance case in the US Court of Appeals for the Ninth Circuit. Michael Newdow is an atheist activist who campaigned to have the two words removed. We represented the school children and their parents, arguing that the phrase “under God” in the Pledge of Allegiance affirms a foundational premise in the American tradition of law and rights—namely, that human rights are not bestowed by the state but are rather derived from a source beyond

the state's discretion. "Under God" does not unconstitutionally advance religion but rather reflects the deeply rooted political philosophy of the Founding Fathers, who believed these rights derived from a source greater than a government made of men.

The pledge was also defended by the Justice Department's lawyers but on different grounds. They defended the pledge on the usual grounds of ceremonial deism, a concept that has been developed in the Supreme Court case law on the subject. Ceremonial deism holds that the words "under God" have been repeated so frequently in a ceremonial way that they have lost all religious meaning.

After considering the case for almost two-and-a-half years, the Ninth Circuit reversed itself and kept the words "under God" in the Pledge of Allegiance.²⁷ In its reasoning, the Ninth Circuit showed it was persuaded by our political philosophy argument rather than the ceremonial deism argument.²⁸ We fully anticipated Newdow would take the case to the Supreme Court, but he did not meet the deadline for filing his petition, so the case is closed. We are happy to say that the pledge is now safely intact in the states within the Ninth Circuit. Though that was a major victory, Newdow has vowed to continue his fight to rid our country of the words "under God" in the Pledge of Allegiance. He has said he will find whatever judge will hear his case and will continue to travel around the country in his quest. The Becket Fund will be there to fight back.

RELIGIOUS DISCRIMINATION

Finally, the fifth theme is discrimination against religious groups. The primary example I want to address here is state Blaine Amendments. Between 1870 and 1900, forty-one states adopted Blaine Amendments to prevent public funds from going to any "sectarian institution."²⁹ At the time, "sectarian" was code for Catholic. The Blaine Amendments were largely a result of anti-Catholic nativism that was sweeping the country at the time. But Blaine Amendments are now used by states to forbid programs that otherwise comply with the federal Establishment Clause. More specifically, the federal Establishment Clause as interpreted in the last half-century permits religion-neutral support of programs with a predominantly secular purpose, provided they do not improperly advance

religion. The Blaine Amendments, which are state constitutional amendments, often operate as a second wave of attack because they can forbid what the federal Establishment Clause permits. So in actual terms, the Blaine Amendments operate to impose a per se bar against funding to all religious organizations. We see the results in a wide variety of cases involving religious organizations, in funding to faith-based organizations, in contracts between a government and religious organizations, and in cases regarding religious schools' choices. There is an effort at the Becket Fund to challenge these state Blaine Amendments through the courts and through legislative repeal.

CONCLUSION

I hope from this overview today that you have seen that the attacks on religious liberty are serious and widespread. More importantly, we have many friends in this battle to uphold religious liberty in this country and abroad. I will close with a quote from Cardinal Francis George, then-president of the US Conference of Catholic Bishops, when he spoke at BYU last year. He delivered a message very similar to Elder Oaks's that I quoted at the beginning of my talk:

In the coming years inter-religious coalitions formed to defend the rights of conscience for individuals and for religious institutions should become a vital bulwark against the tide of forces at work in our government and in our society to reduce religion to a purely private reality. At stake is whether or not the religious voice will maintain its right to be heard in the public square.³⁰

NOTES

1. See the Becket Fund for Religious Liberty, 2010–16, <http://www.becketfund.org>.
2. Dallin H. Oaks, "Preserving Religious Freedom" (lecture, Chapman University School of Law, 4 February 2011), <http://www.mormonnewsroom.org/article/elder-oaks-religious-freedom-Chapman-University>.
3. See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, et al.* (Docket no. 10–553, granted 28 March 2011).

4. See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 582 F. Supp. 2d 881 (E. D. Mich. 2008).
5. See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010).
6. See *Obst v. Germany*, European Court of Human Rights, no. 425/03, 23 September 2010.
7. Derek L. Gaubatz, “Will the Obama Administration Reinterpret Federal Law Re: Religious Discrimination When Awarding Federal Grants?,” 11 February 2011, <http://www.fed-soc.org/publications/detail/will-the.obama-administration-re-interpret-federal-law-re-religious.discrimination-when-awarding-federal-grants>.
8. Gaubatz, “Will the Obama Administration Reinterpret Federal Law Re: Religious Discrimination When Awarding Federal Grants?”
9. Gaubatz, “Will the Obama Administration Reinterpret Federal Law Re: Religious Discrimination When Awarding Federal Grants?”
10. See Kevin Seamus Hasson, *The Right to Be Wrong* (San Francisco: Encounter Books, 2005), 45–67.
11. See *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943).
12. See *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W. D. Wash. 2007) and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).
13. See Belmont Abbey College, North Carolina, 2009, The Becket Fund for Religious Liberty, <http://www.becketfund.org/belmont-abbey-college-north-carolina-2009>.
14. See Belmont Abbey College, North Carolina, 2009, The Becket Fund for Religious Liberty, <http://www.becketfund.org/belmont-abbey-college-north-carolina-2009>.
15. See Nina Shea, “An Anti-Blasphemy Measure Laid to Rest,” *National Review Online*, 31 March 2011, available at <http://www.nationalreview.com/articles/print/263450>.
16. Shea, “An Anti-Blasphemy Measure Laid to Rest.”
17. Shea, “An Anti-Blasphemy Measure Laid to Rest.”
18. Shea, “An Anti-Blasphemy Measure Laid to Rest.”
19. Shea, “An Anti-Blasphemy Measure Laid to Rest.”
20. Shea, “An Anti-Blasphemy Measure Laid to Rest.”
21. Shea, “An Anti-Blasphemy Measure Laid to Rest.”

22. See Peter Gelling, "Law Banning Blasphemy is Upheld in Indonesia," *New York Times*, 19 April 2010, <http://www.nytimes.com/2010/04/20/world/asia/20indo.html>.
23. See Shea, "An Anti-Blasphemy Measure Laid to Rest."
24. Shea, "An Anti-Blasphemy Measure Laid to Rest."
25. See Howard M. Friedman, "Pakistani Student Charged with Blasphemy for Remarks on Exam Paper," <http://religionclause.blogspot.com/2011/02/pakistani-student-charged-with.html>.
26. See Friedman, "Pakistani Student Charged with Blasphemy for Remarks on Exam Paper."
27. See *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007 (9th Cir. 2010).
28. See Ken Blackwell, "Living Under God," *American Spectator*, 18 March 2010, <http://spectator.org/archives/2010/03/18/living-under-god>.
29. See Meir Katz, "The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application" (original in possession of author).
30. Cardinal Francis George, "Catholics and Latter-day Saints: Partners in the Defense of Religious Freedom," 23 February 2010, <http://www.usccb.org/seia/catholics-latter-day.saints.pdf>.