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EDITORIAL

Religious freedom is finally something people are actually voicing opposition to. Returning to its roots in the *Reynolds* Mormon anti-polygamy cases of nearly 150 years ago,[1] people are finally asking the hard questions about the limits of religious freedom, opposing expansive religious freedom restoration bills and even opposing the widely supported federal Religious Freedom Restoration Act (RFRA) of twenty years ago.[2] Maybe religious freedom is like a fine wine—too much of a good thing is unwise.

Three questions about religious freedom are front and center now, each slightly different, albeit each with a common flavor.

The first question is when must or should the government exempt individuals from laws of general applicability because such laws burden their religious free exercise rights. In *Reynolds*, the Supreme Court told us that government need not ever exempt people from laws of general applicability. To many people's surprise, the Supreme Court in 1990 affirmed that rule in *Smith*,[3] albeit with the significant subsequent limitation that the government may not gerrymander the legislation to functionally only regulate religion without surviving the rigorous strict scrutiny analysis.[4] After RFRA was passed, struck down, and repassed in modified form,[5] federal law now is that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[6] Of course, the law provided an exception when both the universal application of the law is needed for the "furtherance of a compelling government interest" and the rule must be the least restrictive way in which to further that government interest. Many people have proposed modifying RFRA exactly because it grants religious organizations, people, and companies too much religious freedom.

The second question was highlighted by the recent Supreme Court decision in *Holt*, addressing the question of the beard rights of a Muslim prisoner in Arkansas, which prohibited such beards.[7] Unanimously, the Supreme Court struck down the ban, but the two-sentence concurrence by Justice Ruth Bader Ginsberg is pithily on point. She writes: "Unlike the exemption this court approved in [the *Hobby Lobby* decision] accommodating petitioner's religious belief in this case would not

1 Reynolds v. United States, 98 U.S. (8 Otto.) 145 (1878).

2 The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4).

3 Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

4 Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). Of course, there is an obvious tension here that has been widely discussed but is worthy of further analysis about when is a fact pattern really a *Smith* case and when is it really a *Lukumi* problem. Consider the recent Second Circuit case of *Central Rabbinical Congress of the United States & Canada v. New York City Department of Health & Mental Hygiene*, 736 F.3d 183 (2d Cir. 2015), as just one example.

5 RFRA was held unconstitutional as applied to the States in *City of Boerne v. Flores*, 521 U.S. 507 (1997), but is still the law governing the US government itself. Congress also passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. 106–274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc).

6 42 U.S.C. § 2000bb-1(a) (2012).

7 Holt v. Hobbs, 135 S. Ct. 853 (2015).

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detrimentally affect others who do not share petitioner's belief."[8] Having the government accommodate a citizen's religious beliefs under RFRA is one thing—but when should the government mandate that religious beliefs be accommodated even when they burden others? This question is now being widely discussed in the various state RFRA discussions that are regularly in the news, and it is what made the *Hobby Lobby*[9] case so politically contentious: religious rights had to compete in the gladiatorial arena with other rights. How should we protect rights of people who do not want to make wedding cakes for others who violate their religious beliefs? Should we at all?

The third question—less frequently in the news right now but perhaps more important—is when may religious communities form legally binding sub-communities that seek to enforce their own rules through contract law and arbitration processes. Should binding arbitration law continue to be a tool used to enforce religious law? As is well known, the fear of Islamic religious family law drove the Canadian province of Ontario to prohibit family matters from going to arbitration, and there is much scholarly support for such restrictions: in this model, religious freedom is itself dangerous even when all the parties appear to want such religious law and values.[10]

Three problems are present: In the first scenario, government coercion to violate one's faith is the fear; in the second, the rights of other private citizens are at stake; and in the third, the liberty interests of religious communities, even when all consent, are under discussion.

Into this foray enters Rafael Domingo with his important contribution, "Restoring Freedom of Conscience," in this issue of the *Journal of Law and Religion*. Pointing us to the historical development of the freedom laws, he proposes an expansive model of exemptions which focuses on abstaining. He writes that

> The privilege of abstaining is the legal system's last resort for protecting individual dignity against collective sovereignty without contravening its own binding force overall. Even when rights are protected, dignity can suffer. Thus, this abstention will be available when a citizen believes that his or her dignity is harmed by a legal command that goes against a perceived moral obligation, even if it does not go against a basic right. The legal system can grant the privilege provided that another person can fulfill the legal obligation in question, if it is one that must be fulfilled for the sake of the common good. The petitioner would then be allowed to remain in silence, in loyal silence, as the best way to resolve the conflict between public and private moral obligation. But the political community would also fall into silence, in the sense of avoiding any legal action against the petitioner for not complying with the legal command. The laws would be silent in order to protect individual dignity as the core source of political sovereignty.

Of course, other theories are also possible, but the central question remains the same: when confronted with a claim of religious liberty and the counter claim of a general law of applicability, whose rights ought to be privileged? And hanging in the balance of that simple question is another: How broad and deep will religious liberty be in the United States of America? Will it be only against the government (as Justice Ginsberg proposes in *Holt*) or even from laws that fundamentally

8 Ibid., 867.

9 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

10 "Nothing in Ontario law prevents people from turning to a religious official or someone knowledgeable in the principles of their religion to help them resolve their family dispute. However, if that person made a decision based on religious principles, the decision would not be a valid family arbitration award under the law. Both spouses could comply with the decision voluntarily, but the decision would not be enforceable if one of the people involved took it to court. The court may only enforce awards made in arbitrations conducted exclusively under Canadian law." Ministry of the Attorney General, Province of Ontario, *Faith-based (Religious) Family Arbitration*, http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/faith-based.asp.

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mandate a duty from one citizen to another (as Justice Alito insists in *Hobby Lobby*) or will US law move to a Canadian model that insists that state interest is enough to curtail religious arbitrational rights? Or is there some other position that has yet to find favor with five Justices on the Supreme Court grounded in some other theory?

Religious freedom is commonly called the "first freedom" in our powerful democracy, but words alone do not make rights valuable: if religious freedom is to be important, it is to be measured by the degree of protection we provide faiths and the faithful that are unpopular, or are promoting unpopular ideas, or are even antagonizing significant segments of our society. Even more importantly, religious liberty ought not be placed in gladiatorial battle with other rights—as our author Rafael Domingo posits, the right to abstain ought to be a cherished right and that can only be done when there is a societal commitment not to allow religious freedom battles to be ones with losers as well as winners.

Michael J. Broyde
Center for the Study of Law and Religion, Emory University

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