RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / JUNE 2021

FROM *the* EDITOR

Welcome to the June 2021 issue of the *Religious Liberty Law Section Newsletter*.

One of the first legal acts to be taken by English colonists in North America was what has come to be referred to as the *Mayflower Compact*, signed in 1620 by the English colonists arriving in what is now Massachusetts. It is interesting to note that, in a document of fewer than 200 words, six religious references are embedded. The *Compact* was made "In the Name of God." And one of the purposes of the colonists' adventure in the "New World" was set forth as being for the "Advancement of the Christian Faith." To solemnize the *Compact* – or the promise the colonists were making to one another – the signers signed the *Compact* "in the Presence of God." One might be tempted to dismiss these religious references as reflecting the peculiar outlook of the religious separatists – or Pilgrims – who were on the Mayflower. But of the 102 passengers on the Mayflower, only 41 were Pilgrims. The *Mayflower Compact* was the first attempt to create a written constitution in the "New World." John Quincy Adams, in 1802, stated that the *Mayflower Compact* was "perhaps the only instance, in human history, of that positive, original social compact, which speculative philosophers have imagined as the only legitimate source of government." Because the *Mayflower Compact* was written by religious believers, who fled to America for religious reasons, and so clearly and repeatedly expressed their reliance on religious beliefs, I have chosen the *Mayflower Compact* as the Great Moments in Religious Liberty History entry for this issue of the *Newsletter*.

Also, I want to extend a personal note of thanks to Ketti McCormick, the author of this issue's Feature Article addressing the intersection of two constitutional rights – free exercise of religion and parental rights.

As always, we hope you find this issue of the *Religious Liberty Law Section Newsletter* both informative and useful.

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority. It has not left the religion of its citizens under the power of its public functionaries."

— Thomas Jefferson, February 4, 1809.

Letter to Rev. Richard Douglas, Isaiah Bolles, and the Society of the Methodist Episcopal Church at New London, Connecticut.

IN *this* ISSUE

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FROM *the* IMMEDIATE PAST CHAIR

Perhaps nothing comes more naturally to us than seeing things our way. Even viewpoints upon trivial matters often devolve into conflict. Valuing the things we prefer or with which we agree comes so much more intuitively than valuing the things we do not. It is a fundamental right and an innate human instinct to have a viewpoint, to believe it should be heard, and to believe it will change the world. And, indeed, it might. But that is the brighter side of liberty. The murkier side – the more challenging side – is valuing that which you do not value naturally.

In the throes of World War I, five Russian immigrants with admittedly anarchist, anti-government, and (in one case) socialist and anti-capitalist views rented a room, bought printing equipment, printed circulars advocating revolutionary action, and distributed them by throwing them from a window of a New York building. The circular expressly denounced the United States government and President Woodrow Wilson and culminated with the phrases "The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!" and "Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM." *Abrams v. United States*, 250 U.S. 616, 616-23, 40 S. Ct. 17, 22, 63 L. Ed. 1173 (1919). Justice Clarke's November 10, 1919 opinion for the majority just over one year after the conclusion of the war reads with understandable contempt for these statements and the arguments made in support of the defendants and affirmed Defendants' conviction under the Espionage Act enacted by Congress in 1917 and amended in 1918. *Id.* at 623-24.

But *Abrams* is best known for Justice Oliver Wendell Holmes' dissent. "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." *Id.* at 630–31 (Holmes, dissenting). "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment." *Id.* Shortly after the end of the second world war, the Supreme Court expressed the notable movement toward the dissents by Justices Holmes and Brandeis in this and similar contemporaneous cases from the era. See *Dennis v. United States*, 341 U.S. 494, 507, 71 S. Ct. 857, 866, 95 L. Ed. 1137 (1951).

The ethic and discipline espoused by Justice Holmes warrants application in the context of religious liberty, as well. Consider the following from Justice Kagan's concurring opinion in *Masterpiece Cake*: "As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs 'offensive.' That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1734, 201 L. Ed. 2d 35 (2018) (Kagan, dissenting) (citations omitted). The majority opinion stated it more bluntly: "To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere." *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1729. Similar comments were made by city officials in *Church of the Lukumi Babalu Aye, Inc.* concerning the Santeria religious practice and animal sacrifice, including the city attorney's comment that "This community will not tolerate religious practices which are abhorrent to its citizens…." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541–42, 113 S. Ct. 2217, 2231, 124 L. Ed. 2d 472 (1993).

Liberty does not come as easily to us as we might wish. It can be difficult to listen to, let alone value, a viewpoint that stands in opposition to a deeply held religious belief – or, conversely, a deeply held religious belief that stands in opposition to a viewpoint. Such is the nature of liberty. Although the cases above expressly concern the intersection of governmental action and personal liberty, the justices' words allude to the underlying challenge of people respecting each other's liberty when it does not come naturally. The Founding Fathers perhaps guaranteed religious liberty first in the Bill of Rights because it is both so dear and so easily eroded by good intentions. The Religious Liberty Law Section exists to prevent such erosion and preserve religious liberty as the first and, to many, dearest of liberties guaranteed by our Constitution.

James Williams

James L. Williams,
Immediate Past Chair

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

The Mayflower Compact

In the name of God, Amen. *We, whose names are underwritten, the Loyal Subjects of our Dread Sovereign Lord King James, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: and by Virtue hereof do enact, constitute, and frame such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall thought to be most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience.*

IN WITNESS WHEREOF *we have hereunto subscribed our names at Cape-Cod, the eleventh of November, in the Reign of our Sovereign Lord King James, of England, France, and Ireland, the eighteenth, and of Scotland, the fifty-fourth, Anno Domini; 1620.*

SELECTED U.S. CASE LAW *Updates*

CASE 1

South Bay United Pentecostal Church, et al. v. Newsom

141 S.Ct. 716 (2021).

A CALIFORNIA EXECUTIVE ORDER LIMITING IN-DOOR CHURCH SERVICE ATTENDANCE DESIGNED FOR THE PURPOSE OF CONTAINING THE SPREAD OF THE COVID VIRUS IS UNCONSTITUTIONAL BECAUSE IT TREATS PLACES OF WORSHIP LESS FAVORABLY THAN PLACES HOSTING SIMILAR SECULAR ACTIVITIES.

In this case, the Court granted in part an application for injunctive relief against an executive order from the Governor of California which prohibited religious institutions from holding any kind of indoor worship services.

Justice Gorsuch's opinion – in which Justice Thomas and Justice Alito joined – provides the most in-depth analysis of the Court's decision. In it, Justice Gorsuch wrote that "Often, courts addressing First Amendment free exercise challenges face difficult questions about whether a law reflects 'subtle departures from neutrality,' 'religious gerrymander[ing],' or 'impermissible targeting' of religion… But not here. Since the arrival of COVID-19, California has openly imposed more stringent regulations on religious institutions than on many businesses… California is the only State in the country that has gone so far as to ban all indoor religious services… When a State so obviously targets religion for differential treatment, our job becomes that much clearer."

Justice Gorsuch when on to write, "Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty… Even in times of crisis – perhaps *especially* in times of crisis – we have a duty to hold governments to the Constitution." "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner. As this crisis enters its second year – and hovers over a second Lent, a second Passover, and a second Ramadan – it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could… if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry."

In conclusion, after noting that California failed to sufficiently explain why it imposed more restrictive prohibi-

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tions on religious institutions than it did on malls, salons, and other retailers, Justice Gorsuch determined that "edicts like California's fail strict scrutiny and violate the Constitution" because "California singles out religion for worse treatment than many secular activities."

Justice Kagan, joined by Justice Breyer and Justice Sotomayor dissented – with the opening sentence of their dissent summing up their reasoning – "Justices of this Court are not scientists."

CASE 2

Ritesh Tandon, et al. v. Newsom, et al.

141 S.Ct. 1294 (2021).

A CALIFORNIA EXECUTIVE ORDER LIMITING RELIGIOUS GATHERINGS IN HOMES TO NO MORE THAN THREE HOUSEHOLDS WAS UNCONSTITUTIONAL BECAUSE IT TREATED RELIGIOUS GATHERINGS IN HOMES LESS FAVORABLY THAN PLACES WHERE PEOPLE GATHER FOR SECULAR PURPOSES.

In this *per curiam* opinion, entered two months after its *South Bay United Pentecostal Church* decision, the Court enjoined the Governor of California's order that limited religious gatherings in homes to no more than three households. The Court found that the Governor's order was not neutral and generally applicable under the Free Exercise Clause because the order treated religious exercise less favorably than some comparable secular activities, stating "Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too… California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time."

In conclusion, the Court stated, "This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise… Th[e][strict scrutiny] standard 'is not watered down'; it 'really means what it says.'"

As in the *South Bay United Pentecostal Church* case, Justice Kagan filed a dissent, joined by Justice Breyer and Justice Sotomayor, writing, "I would deny the application largely for the reasons stated in *South Bay United Pentecostal Church v. Newsom*."

CASE 3

Uzuegbunam, et al. v. Preczewski, et al.

141 S. Ct. 792 (2021).

FOR THE PURPOSE OF ARTICLE III STANDING, NOMINAL DAMAGES PROVIDE THE NECESSARY REDRESS FOR A COMPLETED VIOLATION OF A LEGAL RIGHT.

In this case, Georgia Gwinnett College prevented students from exercising their religion by sharing their faith on campus, pursuant to a College policy that prohibited using the College's free speech zone to say anything that "disturbs the peace and/or comfort of person(s)." The students were threatened with discipline if they shared their faith on campus, because complaints about their speech were filed with the College. Due to the College's threats, the students stopped speaking. The students sued the College for nominal damages and an injunction, alleging that the College's speech policies violated the First Amendment. In the face of the students' lawsuit, the College discontinued the challenged speech policies, and then argued that doing so left the students without standing to sue.

Below, the 11th Circuit Court of Appeals ruled that the students' plea for nominal damages alone could not by itself establish standing. The U.S. Supreme Court disagreed.

After recounting the history of nominal damages under English and American law, the High Court stated that "Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages." The Court rejected the idea that nominal damages are "purely symbolic, a mere token that provides no actual benefit to the plaintiff," saying that "[d]espite being small, nominal damages are certainly concrete… Because nominal damages are in fact damages paid to the plaintiff, they 'affec[t] the behavior of the defendant towards the plaintiff' and thus independently provide redress."

In conclusion, the Court stated that "Because nominal damages were available at common law in analogous circumstances, we conclude that a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." Therefore, since the students experienced a completed violation of their constitutional rights when the College enforced its speech policies against them – and 'every violation [of a right] imports damage,' "nominal damages can redress [] injury even if [the plaintiff] cannot or chooses not to quantify that harm in economic terms."

Justice Kavanaugh filed a concurring Opinion. Chief Justice Roberts filed a dissenting Opinion.

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CASE 4

United States v. Brown

___F.3d ___ (11th Cir. 2021), 2021 WL 1821852.

IT WAS ERROR FOR A TRIAL JUDGE TO DISMISS A JUROR ON THE GROUND THAT THE JUROR HAD SAID THE HOLY SPIRIT HAD TOLD THE JUROR THAT THE DEFENDANT WAS NOT GUILTY.

After a juror stated during jury deliberations in a criminal trial that the Holy Spirit had told him that the defendant was not guilty, the trial judge dismissed the juror.

In considering the appropriateness of the trial judge's dismissal of the juror, the Court of Appeals began its deliberation setting forth the standard a trial judge should use in deciding whether dismissal of a juror is necessary. The court stated that "a juror should be excused only when no substantial possibility exists that the juror is basing his or her decision on the sufficiency of the evidence… So, for a district court judge to find that this standard of proof is satisfied, he must determine 'with utmost certainty' that a juror has refused to base his verdict on the law as instructed and the evidence admitted at trial." Stated another way, the court stated "We ask whether Juror 13's religious statements amounted to proof beyond a reasonable doubt that he could not render a verdict based solely on the evidence and the law, thereby disqualifying him…" The court determined that the juror's religious statements did not disqualify him and that the trial judge had erred in dismissing the juror.

The court stated that "Religious beliefs may provide the basis for removal when those beliefs do not permit them to complete their jury service" and that "Courts may exclude or remove jurors who make clear that they may not sit in judgment of others based on their religious beliefs."

However, the court made clear that a juror relying on religious beliefs in his or her jury deliberations does not, in itself, disqualify a juror – pointing out that "After all, the original and traditional purpose of the juror's oath, like that of all official oaths, is 'to superadd a religious sanction to what would otherwise be his official duty, and to bind his conscience' against misuse of his office" as a juror.

The court also noted that "Jurors may pray for and believe they have received divine guidance as they determine another person's innocence or guilt" because "Prayer is 'a part of the personal decision-making process of many, a process that is employed when serving on a jury.'" The court stated that, "to ask that jurors become fundamentally different people when they enter the jury room is at odds with the idea that the jury 'be drawn from a fair cross section of the community.'"

Turning its attention to dismissed Juror 13, the court found that "Juror No. 13's vivid and direct religious language – read in the light of his other statements – suggests he was doing nothing more than praying for and receiving divine guidance as he evaluated the evidence or, in secular terms, provided an explanation of his internal mental processes – all consistent with proper jury service." Indeed, the court noted that the dismissed juror's religious beliefs actually supported the juror's ability to properly serve as a juror because "it is more than reasonable to doubt that a religious juror would have lightly violated his oath."

The court pointed out that, when investigating a juror for possible dismissal, the trial judge must keep in mind that "People talk about religion in different ways… and that courts may not conclude that their vernacular alone disqualifies them from jury service" and that "Juror No. 13's expression that God had communicated with him may be construed as his description of an internal mental event, not an impermissible external instruction" and that "Juror No. 13's vernacular that the Holy Spirit 'told' him Brown was 'not guilty on all charges' was no more disqualifying by itself than a secular juror's statement that his conscience or gut 'told' him the same."

In conclusion, the court determined that "we are not persuaded that Juror No. 13 came even close to" allowing religious considerations to replace legal ones and, therefore, the trial judge erred in dismissing the juror. The court vacated the defendant's convictions an sentence and remanded for a new trial.

Four judges filed a concurring opinion and four judges filed a dissenting opinion.

CASE 5

Kennedy v. Bremerton School District

991 F.3d 1004 (9th Cir. 2021).

A SCHOOL DISTRICT DID NOT VIOLATE THE FREE EXERCISE RIGHTS OF A COACH WHEN IT PROHIBITED HIM FROM ENGAGING IN PRAYER ON THE 50-YARD LINE AFTER SCHOOL FOOTBALL GAMES.

Kennedy was a coach at a public high school. He had developed a practice that, after each football game, he would kneel in the middle of the field at the 50-yard line and pray. Over time, many of his players – and even players from the opposing team – would voluntarily join him. Fearing that the coach's prayer practices violated the Establishment Clause, the school forbade him from engaging in that activity at that time and in that place. The school did, however, advise Kennedy that he could engage in personal religious activity – including prayer – as long as that activity was physically separate from any student activity and students were not

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allowed to join him. When the coach refused to comply, the school placed him on paid administrative leave and, ultimately, he did not return for the next season.

The court first addressed Kennedy's Free Speech claim. The court found that, under the *Pickering* analysis, Kennedy's prayer speech was spoken as a public employee – not a private citizen – because he was on duty when he spoke and, therefore, it was not protected speech. The court also found that, even if his prayer speech was protected, the school's interest in avoiding an Establishment Clause violation was compelling and that the only way the school could avoid such a violation was by prohibiting the prayer speech as it did.

The court then addressed Kennedy's Free Exercise claim. Because the school conceded that it was prohibiting Kennedy's speech precisely because it was religious speech – in an attempt to avoid an Establishment Clause violation – the court applied strict scrutiny analysis. As under his Free Speech claims, though, the court determined that avoiding an Establishment Clause violation was a compelling state interest and that no less restrictive means to serve that interest were available to the school other than prohibiting Kennedy's religious exercise. Therefore, the court rejected Kennedy's Free Exercise claim.

Finally, the court addressed Kennedy's Title VII religious discrimination claims, but found them all wanting because (1) Kennedy's refusal to abide by the school's directives concerning his mid-field prayer practices demonstrated that he was not adequately performing his job, (2) there was no disparate treatment of Kennedy because there were no similarly situated employees treated differently, (3) the school tried but could not accommodate Kennedy's religious practice request without violating the Establishment Clause, and (4) his refusal to follow the school's directives designed to protect against Establishment Clause violations was a legitimate non-discriminatory reason for the school's actions against Kennedy.

CASE 6

The Religious Sisters of Mercy, et al. v. Azar

___ F.Supp.3d ___ (D. North Dakota 2021), 2021 WL 191009.

THE GOVERNMENT FAILED TO CARRY ITS BURDEN UNDER THE FEDERAL RFRA OF USING THE LEAST RESTRICTIVE MEANS WHEN IT SOUGHT TO FORCE A CATHOLIC HEALTH CARE CENTER TO PROVIDE GENDER-TRANSITION PROCEDURES AND HEALTH INSURANCE CONTRARY TO ITS RELIGIOUS BELIEFS.

The Religious Sisters of Mercy is a Catholic order of religious sisters devoted to works of mercy, including offering healthcare to the underserved, in part through the Sacred Heart Mercy Health Care Center. Several of the sisters work at the center as doctors, nurses, and other healthcare professionals. They object to performing gender-transition procedures because to do so would violate their religious beliefs that "every man and woman is created in the image and likeness of God, and that they reflect God's image in unique – and uniquely dignified – ways." For the same reason, they also object to providing health benefits to their employees for abortions, sterilizations, and gender transitions. Other plaintiffs had similar or additional objections to the implementation of a section of the Affordable Care Act (ACA) that prohibited any federally funded or administered health care program or activity from engaging in discrimination, including on the basis of gender identity.

The court began its analysis by reviewing the provisions of the federal Religious Freedom Restoration Act which provides "very broad protection for religious liberty." The court noted that "RFRA forbids governments to 'substantially burden a person's exercise of religion' unless the burden (1) 'is in furtherance of a compelling government interest' and (2) 'is the least restrictive means of furthering that compelling interest.'"

Applying RFRA, the court first found that "In this instance, adverse practical consequences abound" because the Catholic Plaintiffs refusal to perform or cover gender-transition procedures would result in the loss of millions of dollars in federal healthcare funding and incurring civil and criminal liability.

The court also found that "compliance with the challenged laws would violate the Catholic Plaintiffs' religious beliefs as they understand them."

Although the court "harbor[ed] serious doubts that a compelling interest exists," the court found it need not resolve that issue because the government failed to meet the least-restrictive means test.

"Here" – the court said – "the [government] possess[es] many less restrictive alternatives beyond forcing the Catholic Plaintiffs to perform and cover gender-transition procedures in violation of their religious beliefs." The less-restrictive alternatives the court identified included: (1) "for the Government to assume the cost of providing gender-transition procedures for those unable to obtain them under their health-insurance policies due to their employers' religious objections"; (2) providing subsidies, reimbursements, tax credits, or tax deductions to employees; (3) paying for services at community health centers, public clinics, and hospitals with income-based support; (4) treating employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage at all; and (5) assisting individuals in finding and paying for transi-

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tion procedures available from healthcare providers who offer and specialize in those services.

In light of these less-restrictive alternatives, the court concluded that the government "failed to demonstrate that their policies use the least restrictive means to burden the Catholic Plaintiffs exercise of religious" – and, therefore, granted summary judgment to the Catholic Plaintiffs.

CASE 7

Christakis v. Deitsch

478 P.3d 241 (Ariz. App. 2020)

A REQUEST OF MONETARY DAMAGES PURSUANT TO CLAIMS OF FALSE LIGHT INVASION OF PRIVACY AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WAS NOT BARRED BY THE ECCLESIASTICAL ABSTENTION DOCTRINE.

In *Christakis v. Deitsch*, the Arizona Court of Appeals held that a civil court was not barred by the ecclesiastical abstention doctrine from hearing a matter that, although arising "against a religious backdrop, … were substantially neutral tort claims not implicating ecclesiastical abstention."

The claims arose out of a letter the defendant Rabbi sent to the plaintiff, who was a member of a Jewish religious community. In the letter, the Rabbi barred the plaintiff from attending any event sponsored by the religious community, following another member's accusations that the plaintiff was grooming children for molestation. The plaintiff claimed that the Rabbi knew the accusations were false, but nevertheless aided the accuser, causing the plaintiff severe emotional harm. The Rabbi moved to dismiss based on the ecclesiastical abstention doctrine.

However, the Court – after discussing the ecclesiastical abstention doctrine – concluded that the dispute could be resolved through the application of neutral principles of law without inquiring into religious doctrine and without resolving any religious controversy. For that reason, the Court denied the Rabbi's motion to dismiss on ecclesiastical abstention grounds.

The Court hinted, however, that had the plaintiff requested reinstatement to the Jewish religious community, rather than just damages, the ecclesiastical abstention doctrine might have applied.

FEATURE ARTICLE

Religious Liberty and Parental Rights

By Kettie McCormick

The First Amendment to the Constitution of the United States provides that "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 Government for a redress of grievances."[1]

In addition, the Supreme Court of the United States has determined that the Constitution grants parents the fundamental right to determine the upbringing of their children.[2]

For those reasons, laws that purport to restrict parental decisions concerning the religious upbringing of their children encounter two jurisprudential obstacles – the Free Exercise Clause of the U.S. Constitution and the fundamental right of parents to determine the religious upbringing of their children. Further, to the extent the government invades the parent-child relationship by prohibiting a parent from speaking to his or her child or others – or compelling the parent to speak to his or her child or others – about certain religious subjects, doctrines, or beliefs, the Free Speech Clause of the First Amendment is also implicated.

General Principles – *Wisconsin v. Yoder* and *Troxel v. Granville*

One of the most important cases in this area of the law is *Wisconsin v Yoder*. It is important because the case pitted the rights of a child's biological or legal parents against the interests of the state as *parens patriae*. In considering these respective interests, the Supreme Court, in *Yoder*, established several important principles that deserve close attention.

At issue in *Yoder* was a Wisconsin law requiring school attendance of children through age 16. After Amish parents violated the law by ending their children's school attendance after 8th grade – pursuant to the parents' religious beliefs that their children's attendance at school beyond the 8th grade would endanger the salvation of both the parents and children – the parents were charged and convicted of having violated the Wisconsin law. But, on appeal, the Supreme Court determined that the Wisconsin law could not be enforced against these Amish parents.

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ABOUT THE AUTHOR

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In coming to its conclusion, the Court pointed out that "this case involves the fundamental interests of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[3] Citing its decision in *Meyer v. Nebraska*,[4] the Court went on to state that "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations" and those additional obligations "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."[5] The Court noted that "the Court's holding in *Pierce*[] stands as a charter of the rights of parents to direct the religious upbringing of their children."[6] The Court characterized the interests of parents in the religious upbringing of their children as a "fundamental right[]" and a "fundamental interest."[7]

The Court, of course, did not conclude that the parental right to determine the religious upbringing of their children is without limitation. However, the Court held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[8] And the Court held that, in this case, the Amish parents had demonstrated that foregoing the additionally required years of formal education would not impair the physical or mental health of their children, result in the children's inability to become self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.[9]

In reaching its decision, the Court rejected several commonly asserted arguments in Religion Clause cases. First, it rejected the State's argument that the Religion Clauses protect religious beliefs, but not religiously motivated actions.[10] Second, the Court rejected the State's argument that its compulsory school attendance law passed constitutional muster merely because the law did not, on its face, discriminate against religion.[11] Third, the Court rejected the State's argument that the State's interest in its compulsory education system was so compelling as to override any religious-based objections to it.[12] And fourth, the Court rejected the State's argument that the State's role as *parens patriae* entitled the State to extend the benefits of secondary education to children within the State regardless of the wishes of their parents.[13]

Generally speaking, then, the lesson of *Yoder* is that children are not mere creatures of the State and that parents have the right to determine and control the religious upbringing of their children unless the competing state interests are of the highest order and cannot be otherwise served except by overriding the parents' rights to the free exercise of religion.

A later case reiterating the same principle is *Troxel v. Granville*.[14] In *Troxel*, the Court stated that "the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court" and the Court provides a helpful historical journey through the Court's application of that principle over a period of about 60 years.[15] The Court pointed out that "there is a [constitutional] presumption that fit parents act in the best interests of their children."[16]

Parental Rights in Various Contexts

The rights of parents to direct and control the religious upbringing of their children arise in a number of contexts, including parental decisions regarding a child's education, medical care, and discipline. Although – due to space limitations – parental rights in these differing contexts can be neither comprehensively nor exhaustively discussed in this article, it is my aim to identify several areas in which the parents' right to direct and control the upbringing of their children commonly arise, and to provide a short discussion of the general principles at issue when the parents' decisions are motivated, at least in part, by the parents' religious beliefs. Hopefully, this article will provide readers with a starting point with which to begin their own research of this subject for application in a particular context.

Arizona Parents' Bill of Rights

No discussion of parental rights in Arizona would be complete without reference to the Arizona Parents' Bill of Rights,[17] which statutorily establishes a list of rights to which parents are entitled in the upbringing of their children. It provides, in pertinent part for purposes of this article, that: "All parental rights are reserved to a parent of a minor child without obstruction or interference from this state, any political subdivision of this state, any other governmental entity or any other institution, including:

1. The right to direct the education of the minor child.
2. All rights of parents identified in title 15, including the right to access and review all records relating to the minor child.
3. The right to direct the upbringing of the minor child;
4. The right to direct the moral or religious training of the minor child.
5. The right to make health care decisions for the minor child…"

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For purposes of the Parents' Bill of Rights, the term "parent" means the natural or adoptive parent or legal guardian of a minor child.[18]

However, the statute specifically – and importantly – provides that "This section does not authorize or allow a parent to engage in conduct that is unlawful or to abuse or neglect a child in violation of the laws of this state. This section does not prohibit courts, law enforcement officers or employees of a government agency responsible for child welfare from acting in their official capacity within the scope of their authority. This section does not prohibit a court from issuing an order that is otherwise permitted by law."[19]

Therefore, although the Arizona Parents' Bill of Rights codifies, in general terms, the fundamental right of parents to direct and control the upbringing of their children, it does not necessarily define the parameters, or replace or override judicial determinations as to the scope, of those rights. So, for example, in *Louis C. v. Dept. of Child Safety*,[20] the court held that the Parents' Bill of Rights did not prevent a court from making a dependency and neglect finding against a parent who had struck his child in a manner that went beyond reasonable or appropriate discipline.

The remainder of this article will discuss, in general terms, the scope and parameters of parental rights in various contexts.

Education

Although the phenomenon of home-schooling is on the rise, most parents still send their children to either public or private schools outside the home. And when they do so, the parents are entrusting their children to the school to which the children are sent. The question then arises as to whether parents have the right to control what their children are being taught in school and to opt their children out of educational programs that are contrary to the parents' religious beliefs?

The 9th Circuit Court of Appeals had an opportunity to address the first of these issues in *Fields v. Palmdale School District*.[21] There, parents of students in a public elementary school objected to their children being subjected to a questionnaire that, among other things, asked the children about sexual topics. The parents sued the school, contending that the school's actions "deprived them of their free-standing fundamental right 'to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs.'"[22] However, the court rejected the parents' claims, finding that, although parents have a right, in the first instance, to determine whether to send their children to a public school, once they have done so, parents rights are "substantially diminished" and they do not have a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.[23] From a practical standpoint, the court pointed out that "Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy."[24]

The general principle gleaned from *Fields* is that parents do not have the right to control the curriculum of public schools so as to ensure their children are not exposed to information to which the parents object, whether the parents' objection is based on religious or other grounds.

However, although parents may not have a right to control the curriculum of a public school, might parents have a right to protect their children from receiving school-provided information to which the parents object by opting their children out of a school's curriculum, since an opt out would not force the school to alter or otherwise control its curriculum? This is a more difficult question than the first.

In *Parents United for Better Schools v. School District of Philadelphia Board of Education*,[25] the court declined to enjoin the school's condom distribution program over the objections of the parents' claim that the program violated the parents' fundamental right to remain free from unnecessary government interference with the raising of their children. However, the court recognized the "strong parental interest in deciding what is proper for the preservation of their children's health," and in upholding the condom distribution program relied heavily on the fact that participation in the program was voluntary and specifically preserved the right of parents to refuse their children's participation in the program.[26] This suggests that the program might have been more problematic had participation in the program been mandatory. Similarly, in *Curtis v. School Committee of Falmouth*,[27] the court held that a public school condom distribution program did not violate parents' right to control the upbringing of their children where the condom distribution program was not coercive or compulsory and students were free to decline to participate in the program.

In *Swanson v. Guthrie Independent School District No. 1-L*,[28] the court denied the right of Christian homeschooling parents to enroll their high-school age child in public school parttime so as to take advantage of certain public school classes, while continuing to homeschool generally. In denying the parents' claim – that prohibiting parttime public school attendance violated the parent's right to make educational upbringing decisions for their child – the court stated "We see no difference of constitutional dimension between picking and choosing one class your child will not attend, and picking and choosing three, four, or five classes your child will not attend. The right to direct one's

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child's education does not protect either alternative."[29] This case suggests that, at least in some contexts, opting out of classes is not an option.

In *Mozert v. Hawkins County Board of Education*,[30] the court rejected parents' claims that their children should not be required to read school texts, certain parts of which the parents objected to on religious grounds. In rejecting the parents' claim, the court reasoned that, although the texts might present information and ideas to which the parents object on religious grounds, the children – in reading the texts – were not compelled to affirm or deny any religious belief or to engage or refrain from engaging in any practice forbidden or required in the exercise of their religion and, therefore, the parents had failed to establish the existence of an unconstitutional burden. This case approached the issue from a Free Exercise analysis, and one wonders whether the result might have been different had the parents raised a parental rights claim.

In *Leebaert v. Harrington*,[31] the court addressed the issue head-on, finding that a father had no right to opt his son out of a mandatory public school health class, some parts of which the father objected to on religious grounds. In reaching its conclusion, the court seemed to brush aside the parent's religious objections, finding that, unlike in *Yoder*, the father had not demonstrated how his son's participation in the health class would have conflicted with his religious beliefs or practices, or been at odds with his religion. But in finding against the parent, the court ultimately rested its conclusion on practical considerations that would flow from recognizing an opt out right. The court stated that "If defendants were required by law to grant plaintiff's request, then any parent would be able to exercise a right to have his or her child excluded from the mandatory parts of the health course or another required course to which the parent objected… Giving each parent a veto over required courses or lessons would undermine the state's authority to establish a minimum course of study for its youth."[32]

Similarly, in *Davis v. Page*,[33] the court considered parents' demands that their elementary-age children be allowed to opt out of classroom activities that ran counter to the parents' religious beliefs about movies, music, and health education. After acknowledging that balancing the state's interest in education against the fundamental rights of parents to control the upbringing of their children was "a most precarious one," the court did so. With respect to the use of audio-visual equipment in the classroom (which violated the parents' objection to movies), the court held that due to its ubiquitous and educationally effective use, allowing the children to leave the classroom whenever audio-visual equipment was used would deprive the children of an effective education. However, the court noted that if audio-visual apparatus was used in the school for entertainment, as opposed to educational, purposes, the children should be allowed to opt out of that. With respect to the parents' objection to health education, the court found that the parents did not demonstrate that their objections were religious – but, rather, merely distasteful – and, given the importance of health education and the discretion vested in school authorities to determine curriculum, the court could not find a constitutionally significant burden which would justify allowing the students to opt out of the health course. The court found essentially the same with respect to music classes.

The principle gleaned from these various cases is that, although it is possible for a parent to allege a valid claim to opt his or her child out of an otherwise mandatory instruction, class, or material used in a public school, based upon the parent's right to control the child's upbringing, such a claim must be securely and articulately grounded in the parent's religious belief, the instruction must clearly violate that belief, and the opt out must not significantly compromise the state's interest in providing the child an effective education. In addition, of course, Arizona parents may have a stronger claim then these cases provide for, under the Arizona Parents' Bill of Rights, which specifically reserves to a parent the right to direct the education of their minor children.

Medical Care

Unless children are in the custody of the state, parents – as a practical matter – usually make medical decisions on behalf of their children. They choose the children's medical providers, consent to medical treatments and procedures to which their children are subjected, and themselves provide medical care to their children at home, including the administration of treatments and medications. Here, too, questions arise as to whether parents have the right to determine what medical care their children receive, particularly if the medical care conflicts with the parents' religious beliefs?

The U.S. Court of Appeals for the 10th Circuit discussed the medical decision-making rights of parents in *P.J. ex rel. Jensen v. Wagner*.[34] Considering the issue in the context of parents who failed to provide timely life-saving chemotherapy for their son, the court began its analysis by acknowledging that in *Troxel* "the Supreme Court, stated that 'the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." From that general principle, the 10th Circuit Court concluded that "although we have never specifically recognized or defined the scope of a parent's right to direct her child's medical care … we do not doubt that a parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical

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care." Based on both Supreme Court and 10th Circuit case law, the court concluded that "this precedent reasonably suggests that the Due Process Clause provides some level of protection for parents' decisions regarding their children's medical care."[35]

However, the court also determined that "parental rights, including the right to control a child's medical care, are not absolute." Noting that "states have a compelling interest and a solemn duty to protect the lives and health of children within their borders," the court stated that "when a child's life and health are endangered by her parents' decisions, in some circumstances a state may intervene without violating the parents' constitutional rights."[36] "Furthermore, [the court noted that] when a child's life is under immediate threat, a state's interest in protecting the child is at its zenith, and a state has broad authority to intervene in parental decision-making [sic] that produces the threat to the child's life."[37]

Therefore, as was the case in *Jensen v. Wagner*, when seven doctors diagnosed the parents' child with life-threatening cancer and recommended that the child undergo immediate chemotherapy in order to save the child's life, the court held that the parents did not have a clearly established constitutional right to refuse that recommended treatment.[38]

An Arizona case of interest is *Stapley v. Stapley*.[39] In *Stapley*, the court removed custody of the divorced parties' three minor children from the mother and granted custody to the father, after the mother, who was an adherent of the Jehovah's Witnesses, testified that she would not provide the children with blood transfusions even if a child was in need of a blood transfusion due to a serious illness or injury. Although noting that the mother's religious beliefs were not, alone, a ground for change of custody, "where there is a serious danger to the life or health of the child as a result of the religious views of a parent, courts … have recognized that this may bar custody by the parent holding such views, or may call for protection against such views by an appropriate order."[40] The court agreed with a New York court that had held that a parent "of course, enjoys her constitutional right to freedom of religion and may practice the religious faith of her choice without interference. She has not, however, the right to impose upon an innocent child the hazards to it flowing from her own religious convictions. The welfare of the child is paramount… The child has a right to survival and a chance to live and the court has a duty to extend its protecting arm to the child."[41] It must also be noted, though, that in Stapley, there were facts in addition to the blood transfusion issue that weighed against the mother's continuing custody, including her exhibited animosity towards the father and her repeated thwarting of the father's attempts to exercise his visitation rights, all of which combined to materially affect the children's welfare.

Refusing medical treatment that is necessary to save the life of a child, however, is clearly on the extreme end of the spectrum in determining the necessity of and a parents' right to refuse such medical treatment. More difficult scenarios arise when the medical treatment is not necessary to preserve or save a child's life.

Although there is not room in this article to consider this question in all its possible iterations, a good context in which to look at this issue is in the context of childhood vaccinations – especially when required for school attendance – because, although withholding vaccinations does not, normally, place a child's life or health in immediate danger, it does raise the issue of withholding preventative healthcare as well as societal interests in preventing the spread of disease to others. It is also an area that has received quite a bit of judicial attention.

The question for our purposes is – if a state does not voluntarily offer religious exemptions from an otherwise universal compulsory child vaccination requirement – do parents have a right to object to the vaccination of their children on religious or parental rights grounds?

The seminal case in this area is *Jacobson v. Massachusetts*.[42] Although not a child vaccination case, in *Jacobson* the U.S. Supreme Court established the principle that a state's compulsory vaccination law, enacted for the public health or public safety, was not "in palpable conflict with the Constitution"[43] so that the Massachusetts law compelling all adult citizens of the state to get vaccinated against smallpox was "a health law, enacted in a reasonable and proper exercise of the police power."[44] However, the Court also noted that its holding did not mean that there were no circumstances under which a citizen might have a claim of exemption from such a law.

Although, as noted, *Jacobson* was not a child vaccination case, many courts have applied the Jacobson principle in child vaccination situations. See, for example, *Phillips v. City of New York*,[45] which held that a substantive due process challenge to the city's statute requiring vaccination of children prior to attending public school was foreclosed by *Jacobson* and did not violate the Free Exercise Clause of the U. S. Constitution. See also *Workman v. Mingo County Board of Education*,[46] in which a West Virginia statute requiring vaccination of children before attending public school, and which contained no exemption for a parent's religious objections, did not violate the parent's substantive due process right to do what the parent reasonably believes is best for the child.

In 2007 the Arizona Court of Appeals addressed compelled child vaccination in *Diana H. v. Rubin, et al*.[47] There, the mother of a nine-month-old daughter who was temporarily in the legal care of the Arizona Department of Economic Security objected, on religious grounds, to the child being vaccinated against common childhood illnesses, including hepatitis B, influenza, tetanus, diphtheria, pertussis,

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rotavirus, polio, and pneumococcus. The court found, first, that a dependency determination does not extinguish a parent's right to control the religious upbringing of his or her child. Then, applying the Yoder test, the court found that – through legislation – Arizona had struck the balance between the state's interest in the health and welfare of its children and a parent's right to control the religious upbringing of his or her children in favor of the parent, because Arizona statutes specifically provide – both in the child-care (A.R.S. § 36-883(C) and public school (A.R.S. § 15-873(A)(1)) contexts – that parents may exempt their children from immunization based on their religious beliefs. By so doing, the court stated, Arizona "has elevated the religious rights of a parent above its own interest in assuring children access to conventional medical care."[48]

As in most of these sorts of cases, however, the court stated that its decision in *Rubin* did not establish an absolute rule. The court stated that it "would not hesitate to find a compelling state interest [in allowing vaccination of the child over the parent's religious objections] had the Department shown that [the child] was especially vulnerable to the diseases prevented by immunization, due perhaps to malnutrition or some other medical condition."[49] Thus the takeaway from Rubin is that, in Arizona, a parent's rights to exempt his or her child from immunization is very strong, but not absolute. If it can be shown that withholding immunization from a child would place the child's health in particularized and serious danger, the state's interest in the health of children might be sufficient to override a parent's right to control the child's religious upbringing.

In passing, I should note that AZ ST § 8-201.01 provides "safe-harbors" for parents in certain medical care situations, including for example, § 8-201.01.A.1 which provides that "A child who in good faith is being furnished Christian Science treatment by a duly accredited practitioner shall not, for that reason alone, be considered an abused, neglected or dependent child" and § 8-201.01.A.2 which provides that "A child whose parent, guardian or custodian refuses to put the child on a psychiatric medication or questions the use of a psychiatric medication shall not be considered to be an abused, neglected or dependent child for that reason alone." In addition, I also remind the reader that the Arizona Parents' Bill of Rights specifically reserves to parents the right to make health care decisions for their minor children, which may provide Arizona parents with an additional layer of parental rights protections in parental health care decision making.

One interesting – and developing – area of the law is whether a health care professional may prescribe or administer contraception, abortion, or transgender treatment (whether hormonal or surgical) to a minor without the parent's knowledge or consent – particularly if the parent would not consent to these procedures due to the parent's religious beliefs about sexual ethics, the sanctity of life, or gender identity? Although, due to space limitations, a discussion of these important issues must await another day, it would seem that a parent's fundamental right to control his or her child's medical care, coupled with the fact that none of these drugs, treatments, or procedures would usually be necessary to avert a life-threatening medical situation of the child, would lead to the conclusion that a parent's knowledge of and consent would have to be obtained before such drugs, treatments, or procedures are prescribed for or administered to a minor child.

Discipline

Parents are the primary actors in determining when and how to discipline their children. And the circumstances under which children are disciplined – including the reasons for the discipline as well as the manner in which such discipline is administered – vary widely. But in this context as well, questions arise as to what limitations, if any, there are on the parents' right to control when and how to discipline their children, especially when the parents' disciplinary decisions and practices are religiously motivated?

In *Doe v. Heck*,[50] the court set forth a helpful framework for analyzing cases of corporal punishment of children. Citing *Meyer v. Nebraska*,[51] the court stated that "the fundamental right of parents to direct the upbringing of their children necessarily includes the right to discipline them." And citing *Ingraham v. Wright*, [52] the court said that "corporal punishment serves important educational interests" and is deeply rooted in the country's history. The court also acknowledged that "people of many faiths, and perhaps some of no faith at all, genuinely believe in the truth of the oft-recited phrase: 'Spare the rod, and spoil the child'" – which has its roots in the Bible, specifically Proverbs 13:24.

Having laid out the legal and cultural basis for the corporal punishment of children, the court stated that "no matter one's view of corporal punishment, the plaintiff parents' liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive [sic] corporal punishment."[53]

As we have come to see, though, this right is not absolute. The court wasted no time in clarifying that "In making this determination, we are by no means suggesting that the right of parents to discipline their children is absolute or that parents are immune from being investigated for child abuse … The right of parents to discipline their children does not give them a license to abuse them. It does, however, preclude state officials from interfering with the right of parents to physically discipline their children … unless there is evidence that the

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discipline being administered is patently unreasonable or excessive."[54]

In Arizona, there is a statute specifically addressing a parent's right to use corporal punishment. A.R.S. § 13-403(1) provides that: "A parent or guardian and a teacher or other person entrusted with the care and supervision of a minor or incompetent person may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent reasonably necessary and appropriate to maintain discipline." Although this statute protects parents from claims that corporal punishment is inherently abusive, it does not provide parents with carte blanche to engage in corporal punishment. The force a parent uses must be both "reasonable and appropriate" in severity as well as "reasonably necessary and appropriate" in purpose.

In *Cespedes v. Lee*,[55] the Arizona Supreme Court provided some guidance in interpreting A.R.S. § 13-403(1). "Generally," the court said, "an objective standard is used in determining whether a defendant's use of force was reasonable" under the circumstances. The standard is not what the parent subjectively believes is reasonable.[56]

In *State v. Hunt*,[57] the Arizona Court of Appeals provided additional guidance. Although *Hunt* was decided prior to the adoption of A.R.S. § 13-403(1), there is no reason to believe the court's opinion in Hunt has been abrogated by the statute. Indeed, it would appear, in general terms, to embody the same spirit as does the ordinance. In Hunt, the court stated that "Corporal punishment of a child by its parent is not prohibited by law in this state but the use of immoderate or excessive physical violence against a child by a parent for correction or discipline purposes is an aggravated assault and battery."[58] In explaining when acceptable discipline crosses the line into criminal abuse, the court stated: "One cannot expound an inflexible rule which would define what, under all conditions, would be reasonable or excessive force in the disciplining of a child. As children vary in degrees of sensitivity, responsibility and other qualities of character, as well as tolerance to pain, age, sex and physical condition, must the degree of parental severity vary, especially when balanced against the gravity of the particular offense for which punishment is to be meted out. An error in parental judgment should not as a matter of law brand the act as unreasonable."[59] "The test of reasonableness is met at that point where the parent ceases to act in good faith and with parental affection, and acts immoderately, cruelly or mercilessly, with a malicious desire to inflict pain, rather than a genuine effort to correct the child by proper means."[60]

In short, a parent in Arizona may use corporal punishment to discipline his or her child. However, that discipline must not be unreasonable, or the infliction of it could constitute criminal assault and battery.

It would appear that a parent's religious beliefs regarding corporal punishment would not normally be a factor in determining the reasonableness or unreasonableness of the discipline the parent employs. However, it seems as if the reason a parent imposes discipline upon a child may be relevant. For example, parents of a particular religious belief might consider their child's moral infractions differently and more seriously than would non-religious parents. Under the Hunt analysis, that difference in perspective might factor into the determination of "the gravity of the particular offense for which punishment is to be meted out." Still, though, it would seem that a court could not constitutionally inquire into the religious basis of the offense for which a religious parent disciplines his or her child, nor determine that such an infraction does not warrant punishment or is not a serious offense, since that would entangle the court in determining the nature and validity of the parent's religious beliefs, something the Constitution does not allow. See, for example, *Thomas v. Review Board of Indiana Employment Sec. Division*,[61] holding that courts should not undertake to dissect religious beliefs. See also *U.S. v. Ballard*,[62] holding that men may believe what they cannot prove and may not be put to the proof of their religious beliefs.

Court Orders Restricting Parental Rights May Be Unconstitutional

In the context of marriage dissolution cases, it is not unusual for courts to enter orders concerning a child's education, religious upbringing, and medical care, among other things and, in so doing, will often enter orders that impact and even interfere with a parent's free speech or free exercise rights. In most cases, the parties seem to accept these sorts of orders as inherently legitimate. However, appellate courts have not hesitated to vacate these sorts of orders where the orders unconstitutionally infringe upon a parent's own speech or religious exercise rights.

The following cases present some circumstances under which such orders have been struck down.

In *In re the Marriage of Newell*,[63] the Magistrate entered an order that prohibited the father from voicing objections concerning his child's medical treatment to the child's health care providers, or from voicing objections concerning his child's education to the child's school. When challenged, the court struck down the Magistrate's order as unconstitutional, finding that the Magistrate's limitation on the father's speech was an unconstitutional content-based speech restriction because the Magistrate had failed to find that the speech restriction was necessary to prevent physical or emotional harm to the child. "Absent demonstrated harm to the child,"

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the court said, "the best interests of the child standard has been determined to be insufficient to serve as a compelling state interest overruling the parents' fundamental rights."[64]

Non-disparagement orders are commonly entered in marriage dissolution cases, and just as commonly go unchallenged. However, in *Shak v. Shak*,[65] the court struck down as an unconstitutional prior restraint, in violation of the First Amendment, a trial court's order that "Neither party shall disparage the other – nor permit any third party to do so – especially when within hearing range of the child" and that "Neither party shall post any comments, solicitations, references or other information regarding this litigation on social media." In striking down this order, the court stated that, "as important as it is to protect a child from the emotional and psychological harm that might follow from one parent's use of vulgar or disparaging words about the other, merely reciting that interest is not enough to satisfy the heavy burden of justifying a prior restraint."[66] "[H]ere," the court said, "[n]o showing was made linking communications by either parent to any grave, imminent harm to the child" and "[t]here has been no showing of anything in this particular child's physical, mental, or emotional state that would make him especially vulnerable to experiencing the type of direct and substantial harm that might require a prior restraint if at any point he were exposed to one parents' disparaging words toward the other."[67] Similarly, in *Adams v. Trusillo*,[68] the court struck down, as an unconstitutionally overbroad prior restraint on the parents' speech, a family court's order prohibiting the parties from making any derogatory statements about each other to any other person.

In *Grigsby v. Coker*,[69] the court struck down, as unconstitutionally overbroad, a trial court's order that enjoined the father and mother "from communicating with any person about the other party in a derogatory manner either in person or by and through their attorneys using such terms as pedophile or other derogatory or defamatory words except when discussing the case with the counsellors or experts."[70] Noting that trial courts do have broad powers in family law cases, the court pointed out that that broad power "does not authorize them to invade constitutional guarantees."[71] As a sad commentary on parental relations in the context of many divorce cases, the court stated that "As the parties have little to say about one another that is not derogatory, the order essentially prohibits them from speaking about one another at all."[72]

Family law courts also often enter orders that restrict a parent's right to control the religious upbringing of the parent's children. In that regard, the Colorado Court of Appeals, in *In re the Marriage of McSoud*,[73] the court provided a comprehensive analysis of under what circumstances such court orders are constitutionally invalid.

In *McSoud*, the mother, who was Protestant, challenged several orders of the trial court that – following the recommendations of a special advocate – invested the father, who was Roman Catholic, with sole decision-making authority as to the child's religious upbringing. The trial court's order included placing upon the mother the obligation to take the child to Catholic religious activities during her parenting time and allowed the mother to take her child to her Protestant church only if she supported the child's participation and attendance at the father's Catholic church. The mother alleged that these orders violated her constitutional free exercise and parenting rights. The mother also objected to the trial court's admission of evidence of her religious practices for purposes of determining the court's child custody orders.

The Court of Appeals began its analysis by citing both *Yoder* and *Troxel* for the proposition that parents have a fundamental right to make care, custody, and control decisions for their children and that "[a] parent's right to determine the religious upbringing of a child derives from the parents' right both to exercise religion freely and to the care, custody, and control of a child."[74]

Importantly, the court went on to state that even "a parent who does not have decision-making authority with respect to religion nevertheless retains a constitutional right to educate the child in that parent's religion,"[75] that "[g]overnmental interference with the constitutional rights of a fit, legal parent is subject to strict scrutiny," and that "[t]his is particularly so as to religious liberty."[76] Hence, the court explained that "'harm to the child from conflicting religious instructions or practices, which would justify" a limitation on a parent's right to educate a child in the parent's religion, must be "substantial" and "'not simply assumed or surmised; it must be demonstrated in detail.'"[77] The court specifically stated that, in accord with the holdings of other courts, "merely exposing a child to a second religion need not be harmful."[78] "[T]he best interest standard cannot overcome the express constitutional right to freedom of religion."[79]

Turning its attention to the specifics of the case before it, the court found that "adoption of the special advocate's recommendations in the permanent orders not only affects mother's rights with respect to the religious upbringing of her child, they also interfere with her own rights under the Free Exercise Clause."[80] In conclusion, the court stated that "[t]o the extent … the court goes beyond allocating sole decision making over the child's religious upbringing and otherwise restricts either parent's right to expose the child to that parent's religious beliefs or to practice that parent's religion, the court must find a compelling state interest in the form of avoiding substantial emotional or physical harm to the child."[81]

For these reasons, the Court of Appeals found that the part of the lower court's order that allowed the mother to take the child to her church only so long as she supported the child's

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participation and attendance at the father's church, unconstitutionally restricted the mother's religious rights. Similarly, the court found that if the order required the mother to accompany the child to Catholic religious activities scheduled during her parenting time, such would "clearly impinge on [the] mother's religious freedom."[82] The court also warned that "[a] court may not properly inquire into or make judgments regarding 'the abstract wisdom of a particular religious value or belief' in allocating parental responsibilities" and, therefore, "evidence of religious beliefs or practices is admissible only as reasonably related to potential mental or physical harm to a child."[83]

The Arizona Supreme Court recently addressed this issue in *Ball v. Ball*,[84] when it struck down a trial court's order that the father could not take his child to a Mormon Church because the parents' parenting plan stated that the parties "may instruct the children in the Christian faith" and the trial court had found that the father's church was not Christian. The Arizona Supreme Court disagreed that the parties' parenting plan prohibited the parties from taking the child to a non-Christian church, finding that the provision was permissive rather than exclusive. More importantly for our discussion, though, the court applied the ecclesiastical abstention doctrine and concluded that "the superior court was required to abstain from handling Mother's claim [that the father's church was not Christian] once it became clear the dispute concerned an ecclesiastical matter, namely, whether Father's Church is part of the 'Christian faith.'" The court stated that "The Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution, … 'preclude civil courts from inquiring into ecclesiastical matters.'" "Here," the court said, "the court dove into an ecclesiastical matter by addressing whether the Father's Church is part of the Christian faith. That very question has long been a matter of theological debate in the United States. A secular court must avoid ruling on such issues to prevent the appearance that government favors one religious view over another."[85] Elaborating, the court stated that "the court did not resolve [the issues concerning the parenting plan] through neutral principles of law but instead engaged in the exact type of inquiry into church doctrine or belief that the First Amendment prohibits. At the second evidentiary hearing, the court: (1) described the issue as 'what is or is not within the definition of Christianity'; (2) allowed Mother to present testimony from a minster from her church claiming that Father's Church was not part of the Christian faith; and (3) admitted into evidence a chart purporting to compare the tenets of Father's Church with Christian beliefs." Because courts are not the appropriate forum to assess whether someone who self-identifies as 'Christian' qualifies to use that term … the ecclesiastical-abstention doctrine applies with full force in this case, and we vacate the superior court's order on that basis."[86]

In closing, the court gave family law practitioners some valuable advice for drafting parenting plans. It stated that the provisions of parenting plans addressing the children's religious upbringing may be enforced without violating the Constitution, but only if a dispute over the plan does not require the court to wade into matters of religious debate or dogma." Therefore, practitioners should "take great care to ensure those provisions [addressing religious upbringing] are as specific and detailed as possible" because "[f]ailure to do so may impermissibly entangle the court in religious matters should a dispute ever arise."[87]

One might argue that the *Ball* decision may have compromised the result in an earlier Court of Appeals case – *Funk v. Ossman*.[88] In *Funk*, the Court of Appeals upheld a trial court's order that prohibited the father from providing formal training and "indoctrination" in the Jewish faith to his son, on the ground that to do so would be harmful to the child. The mother, who had primary custody of the child, converted to Christianity after the divorce and argued that training the child in both Christianity and Judaism was harmful because it created confusion for the child. The trial court found that the teachings and doctrines of Christianity and Judaism are mutually exclusive and enjoined the father from taking the child for formal Jewish religious training or indoctrination, but permitted the father to involve the child in the father's religion short of religious indoctrination. One could argue – in line with *Ball* – that for a court to inquire into the tenets of two religious faiths and declare them "mutually exclusive" violates the ecclesiastical abstention doctrine. After all, to declare the tenets of two different religions "mutually exclusive," the court would have to engage in the same sort of comparative religion analysis that the Supreme Court condemned in *Ball*. But the facts in *Funk* reveal the more important reason underlying the court's order – the fact that the child was experiencing psychosomatic problems, including soiling his pants, that a child psychologist attributed to the differences in religions he was being exposed to, and that "for any child to try to consolidate in his mind two different concepts … would cause long-term confusion and a decision-making problem." The psychologist also testified that the child was having "an anxiety problem" and that "[t]his problem [soiling his pants] and his tension and anxiety ceased when … he stopped going to the Jewish Sunday school."[89] In upholding the trial court's order, the court adopted the rule laid down in an Ohio case that held that "the rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a par-

– continued

ticular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child."[90] Under that rule, the court found that the facts in Funk justified the court's interference.

The take-away from these cases is that attorneys in family law matters should not assume that courts have unfettered authority to enter orders that infringe upon the parents' fundamental constitutional rights – whether those rights are anchored in the parties' rights of free speech, free exercise of religion, or the fundamental right to parent. Courts presiding over marriage dissolution and related family law matters are not free to violate the parties' constitutional rights.

Conclusion

A parent's right to direct and control the upbringing – including the religious upbringing – of his or her children – although not an unlimited right – is a fundamental right, with deep roots in American history and jurisprudence. In Arizona that right is codified.

Therefore, practitioners – including but not limited to family law practitioners – should always keep the existence of this right in mind when representing parents in any context relating to their children, and should never assume that the state's intrusion on a parent's right to raise his or her children is authorized, justified, or constitutional.

ENDNOTES

1. U.S. Const. amend. I
2. *Wisconsin v Yoder*, 406 U.S. 205 (1972).
3. Id at 232.
4. *Meyer v. Nebrask*a, 262 U.S. 390, 534-535 (1923)
5. *Yoder*, 406 U.S. at 233
6. *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)
7. *Yoder* at 214, 232.
8. Id. at 215.
9. Id. at 230
10. Id. at 219.
11. Id. at 220
12. Id. at 221-222.
13 Id. at 229
14. *Troxel v. Granville*, 530 U.S. 57 (2000)
15. Id. at 65-66
16. Id. at 68.
17. A.R.S. § 1-602
18. A.R.S. § 1-602(E).
19. A.R.S. § 1-602(B).
20. *Louis C. v. Dept. of Child Safety*, 353 P.3d 364 (Ariz. Ct. App. 2015).
21. *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005).
22. Id. at 1203
23. Id. at 1206.
24. Id. at 1206
25. *Parents United for Better Schools v. School District of Philadelphia Board of Education*, 148 F.3d 260 (3rd Cir. 1998).
26. Id. at 275.
27. *Curtis v. School Committee of Falmouth*, 652 N.E.2d 580 (Mass. 1995)
28. *Swanson v. Guthrie Independent School District No. 1-L*, 135 F.3d 694 (10th Cir. 1998).
29. Id. at 700.
30. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).
31. *Leebaert v. Harrington*, 193 F.Supp.2d 491 (D. Conn. 2002).
32. Id. at 502.
33. *Davis v. Page*, 385 F.Supp.395 (D. New Hamp. 1974).
34. *P.J. ex rel. Jensen v. Wagner*, 603 F.3d 1132 (10th Cir. 2010)
35. Id. at 1197.
36. Id. at 1197-98
37. Id. at 1198
38. Id. at 1198
39. *Stapley v. Stapley*, 485 P.2d 1181 (Ariz. App. 1971)
40. Id. at 1187
41. Id. at 1187
42. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)
43. Id. at 31
44. Id. at 35
45. *Phillips v. City of New York*, 775 F.3d 538 (2nd Cir. 2015)
46. *Workman v. Mingo County Board of Education*, 419 Fed.Appx. 348 (4th Cir. 2011)
47. *Diana H. v. Rubin, et al.*, 171 P.3d 200 (Ariz. Ct. App. 2007
48. Id. at 206.
49. Id. at 208
50. *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003)
51. *Meyer v. Nebraska*, 262 U.S. 390 (1923)
52. *Ingraham v. Wright*, 430 U.S. 651 (1977)
53. *Doe v. Heck*, supra at 523
54. Id. at 523
55. *Cespedes v. Lee*, 401 P.3d 995 (Ariz. 2017)
56. Id. at 50
57. *State v. Hunt*, 406 P.2d 208 (Ariz. App. 1965)
58. Id. at 222
59. Id. at 222
60. Id. at 222
61. *Thomas v. Review Board of Indiana Employment Sec. Division*, 450 U. S. 707 (1981)
62. *U.S. v. Ballard*, 322 U.S. 78, 86 (1944)
63. *In re the Marriage of Newell*, 192 P.3d 529 (Colo. App. 2008)
64. Id. a 536
65. *Shak v. Shak*, 144 N.E.3d 274 (Mass. 2020)
66. Id. at 279
67. Id. at 280
68. *Adams v. Trusillo*, 245 A.D.2d 446 (N.Y. Sup. Ct. 1997)
69. *Grigsby v. Coker*, 904 S.W.2d 619 (Tex. 1995)
70. Id. at 620
71. Id. at 621
72. Id. at 621
73. *In re the Marriage of McSoud*, 131 P.3d 1208 (Colo. App. 2006)
74. Id. at 1215
75. Id. at 1215
76. Id. at 1216
77. Id. at 1216
78. Id. at 1217
79. Id. at 1217
80. Id. at 1217
81. Id. at 1217
82. Id. at 1219
83. Id. at 1221
84. *Ball v. Ball*, 478 P.3d 704 (Ariz. 2020)
85. Id. at 710-11
86. Id. at 711
87. Id. at 711
88. *Funk v. Ossman*, 724 P.2d 1247 (Ariz. 1986)
89. Id. at 1251
90. Id. at 1250

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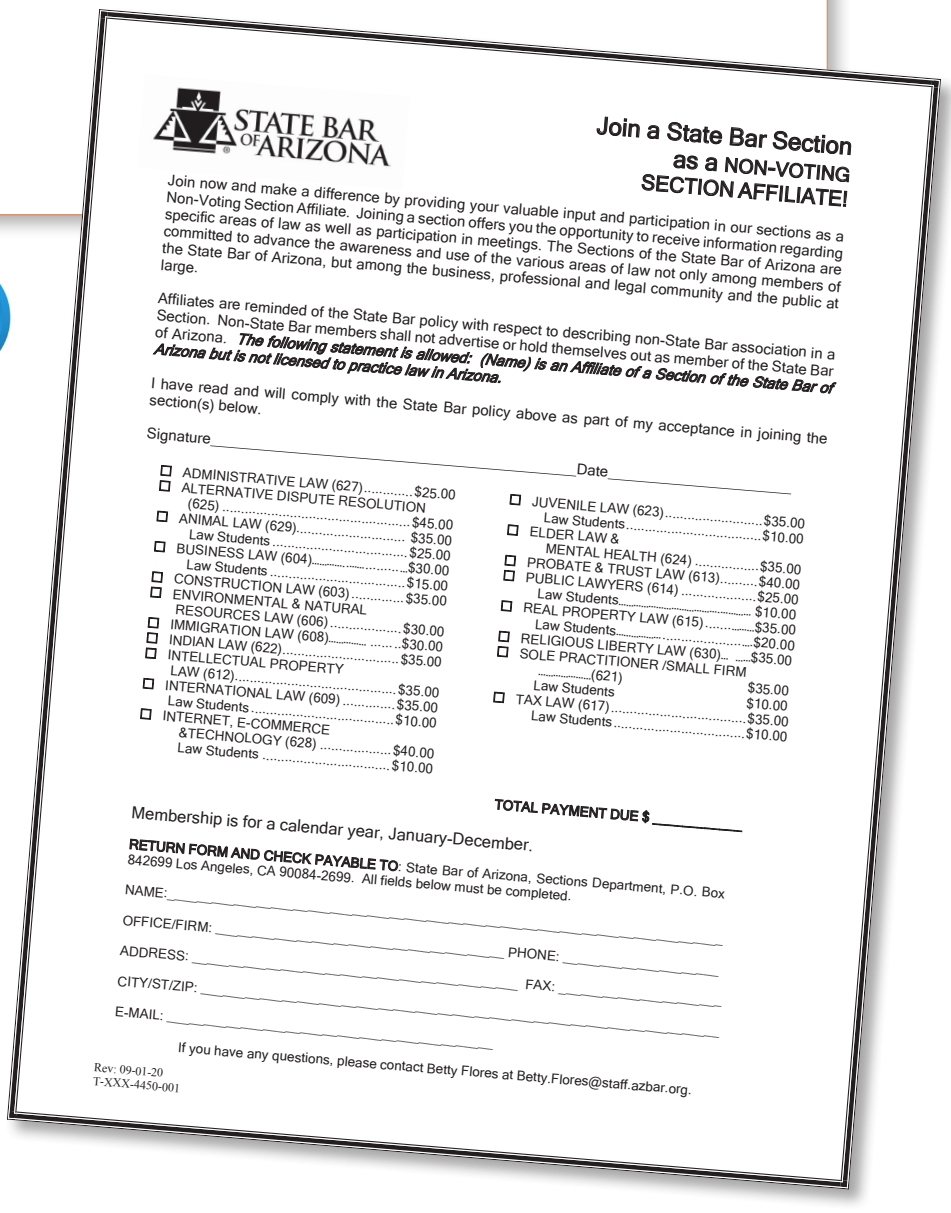

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RESOURCES

LAW RESOURCES

Federal Statutes

Religious Freedom Restoration Act of 1993 – 42 U.S.C. § 2000bb, et seq.

Religious Land Use and Institutionalized Persons Act (RLUIPA) – 42 U.S.C. § 2000cc, et seq.

Equal Access Act – 20 U.S.C. § 4071

Office of the U.S. Attorney General

October 6, 2017 Memorandum: Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006786/download

October 6, 2017 Memorandum: Implementation of Memorandum on Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006791/download

July 30, 2018 Memorandum: Religious Liberty Task Force.
https://www.justice.gov/opa/speech/file/1083876/download

U.S. Department of State

February 5, 2020 Declaration of Principles for the International Religious Freedom Alliance.
https://www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance/

2019 Annual Report of the U.S. Commission on International Religious Freedom.
https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf

July 26, 2019 2nd Annual Ministerial to Advance Religious Freedom: Remarks by Vice President Pence.
https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/

U.S. Department of Justice and U.S. Department of Education

January 16, 2020 Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools.
https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

U.S. Department of Labor

August 10, 2018 Directive 2018-03: To incorporate recent developments in the law regarding religion-exercising organizations and individuals.
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

May 2020 Guidance Regarding Federal Grants and Executive Order 13798 – Equal Treatment in Department of Labor Programs for Religious Organizations.
https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act

U.S. Department of Health and Human Services

Final Regulations Protecting Statutory Conscience Rights in Health Care 45 CFR Part 88
https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf

U.S. Department of Veterans Affairs

VA Directive 0022, Religious Symbols in VA Facilities.

Arizona Statutes

Arizona Freedom of Religion Act –
Ariz. Rev. Stat. § 41-1493.01

Other Resources

American Charter of Freedom of Religion and Conscience.
http://www.americancharter.org

RESOURCES

CLE VIDEOS

2017 ANNUAL CONVENTION CLE

Introduction: Religious Liberty Law Section CLE at the State Bar of Arizona 2017 Annual Convention, held on June 16, 2017

Presenter: David Garner (Osborn Maledon, P.A.)

[watch video]

Historical foundations of religious liberty law

Presenter: Professor Owen Anderson (Arizona State University)

[watch video]

Debate: Resolving conflicts between religious liberty and anti-discrimination laws

Participants: Jenny Pizer (Lambda Legal), Kristen Waggoner (Alliance Defending Freedom), Alexander Dushku (Kirton McConkie)

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Panel Discussion: High profile religious liberty law issues

Moderator: Robert Erven Brown (Gallagher & Kennedy PA)
Panelists: Eric Baxter (The Becket Fund for Religious Liberty), Alexander Dushku (Kirton McConkie), Will Gaona (ACLU of Arizona), Jenny Pizer (Lambda Legal), Professor James Sonne (Stanford Law School), and Kristen Waggoner (Alliance Defending Freedom)

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