NATIONAL REVIEW

Religious Freedom Is Not an Indulgence Doled Out by the State

Increasingly, courts are setting themselves up as arbiters of religious doctrine.

By Mitchell Rocklin & Howard Slugh — August 30, 2016

We Americans have taken religious liberty for granted for most of our history. But if current trends persist, we might not be able to do so for much longer. The future of religious liberty in America is at a precarious crossroads. If we take the right path, we will continue to view religious liberty as a bedrock guarantee of American constitutionalism. If we take the wrong path, we will start to view it as an indulgence that the government can grant or deny as a matter of convenience.

In 1790, President George Washington wrote a letter to the Jewish community of Newport, R.I., explaining that every citizen of the new republic would "possess alike liberty of conscience." Jews would enjoy true security in America because the law would protect freedom of conscience and freedom of religion, recognizing them as "inherent natural rights." The religious liberty of Jews and other minorities would not depend upon the indulgence of the people or the government; it would be expressly protected for all time by the Constitution.

But this formerly dominant view is currently eroding. Some Americans have begun to view religious liberty as a privilege that the majority, at its discretion, may bestow upon the minority. This trend is currently most noticeable in the judiciary, as evidenced in four recent cases: *Stormans v. Wiesman*, *Little Sisters of the Poor v. Burwell*, *Ben-Levi v. Brown*, and *U.S. v. Sterling*.

THE EARLY-WARNING SIGNS IN FOUR CASES

The *Stormans* case dealt with new Washington State regulations that require all pharmacies to stock and dispense abortion-inducing drugs. The Stormans, a religious family that owns a pharmacy, sued Washington State, claiming that the regulations violate the First Amendment right to the free exercise of religion.

The district court ruled in favor of the Stormans and prohibited Washington State from enforcing the regulations. The Ninth Circuit Court of Appeals, however, overturned the lower court's decision and ruled that the regulations did not violate the Stormans's religious liberty. In June 2016, the Supreme Court refused to take up the Stromans's case for review, allowing the regulations to go into effect. Justice Alito wrote a scathing dissent from that refusal, describing the case as an "ominous sign" and a "cause for great concern" to all people who value religious liberty.

Justice Alito concluded that this case was particularly concerning because "there is much evidence that the impetus for the adoption of the [pharmacy] regulations was hostility" to the pharmacists' religious identity. In other words, Washington State's regulations were not neutral regulations aimed at enhancing access to abortifacients. The burden the regulations imposed on religious pharmacists was not merely incidental. Rather, the regulations were a deliberate attempt to stamp out a religious objection that the majority — supported by the courts — refused to tolerate.

Evidence in the *Stormans* district-court record supports Justice Alito's conclusion. That record indicates that none of the plaintiffs' customers had ever been completely denied access to abortion-inducing drugs. The Stormans were willing to refer customers who requested such drugs to nearby pharmacies, and the evidence suggested that this commonsense compromise had been successful. Within five miles of the Stormans's pharmacy, there were more than 30 pharmacies that stocked the drugs in question.

Thirty-eight pharmacist organizations (five national and 33 at the state level) informed the court that this practice of referral properly protected pharmacists' religious liberty "without compromising patient care." The pharmacist organizations argued that Washington State's regulations not only would not increase access to

medications but could actually “reduce patient access to medication by forcing” religious pharmacies to close. Even Washington State acknowledged that the plaintiffs’ practices “do not pose a threat to timely access to lawfully prescribed medications . . . including plan B.” The argument that the state needed to deny the Stormans an accommodation in order to protect access to the drugs is untenable.

The Ninth Circuit did not dispute these facts. It merely found that the state’s interest in minimizing the time and distance customers might have to travel in order to obtain abortifacients was a sufficient justification for the law. The court refused to consider whether the pharmacists could be accommodated, despite the successful accommodation already in place. In essence, the Ninth Circuit determined that even a very minor inconvenience could justify denying a reasonable and proven accommodation for religious liberty.

As Justice Alito noted in his dissent, the Ninth Circuit’s reasoning is undercut by the fact that Washington State’s regulations included exemptions “for an almost unlimited variety of secular reasons.” For example, pharmacies may refuse to stock a drug that “requires additional paperwork or patient monitoring, has a short shelf life, may attract crime, requires simple compounding . . . , or falls outside the pharmacy’s niche.” The only exception not included on the list was one based on religious faith.

The regulations did permit religious pharmacists to refer patients to another pharmacist within the same pharmacy, but they offered no accommodation for a pharmacist who did not have a non-objecting co-worker or for pharmacies owned by religious people. This is contrasted with a complete accommodation for a pharmacist who complained about extra paperwork.

There is no credible reason to believe that individuals are more inconvenienced by pharmacies that refuse to stock drugs for religious reasons than by pharmacies that refuse to stock drugs for secular reasons. The only difference between the two situations is that one objection is based on religion and the other is not. Washington State did not consider itself bound to respect religious objections as inherent natural rights. Instead, it evaluated the “merits” of various objections and found religious objections less worthy of protection than others. Owing to Washington State’s refusal

to tolerate their religious practices, pharmacists such as the Stormans will now be required to choose between their livelihood and their faith.

A second example of American courts refusing to defend religious liberty is *Little Sisters of the Poor v. Burwell*. While some have portrayed this case as a victory for religious liberty, troubling signs lie just beneath the surface.

The Little Sisters of the Poor are an order of nuns who provide housing for the indigent elderly. The nuns objected to a Health and Human Services regulation that, they argue, implicates them in the provision of abortion-inducing drugs in a religiously impermissible manner. The Sisters did not object to the government's directly supplying their employees with drugs or to simply informing the government of their objection. The Sisters indicated that they would find certain alternative accommodations — such as one in which employees received the drugs from a separate government-sponsored health-care plan — religiously acceptable.

The Tenth Circuit Court of Appeals refused to exempt the nuns because it considered their understanding of their own religious beliefs "unconvincing." The Tenth Circuit did not find a competing governmental interest that made it impossible to exempt the nuns, which could be a permissible legal reason for denying a religious accommodation. The court also accepted that the practitioners' claims were sincere — insincerity is another legitimate reason for denying an accommodation — but it never even attempted to analyze whether it would be possible to satisfy the government's interest while protecting the nuns' religious liberty at the same time.

The judges instead told the nuns that complying with the accommodation would not violate their faith in a "substantial" enough manner to merit protection. In doing so, the court usurped the role of the clergy and made itself into an arbiter of religious doctrine. However, as the Supreme Court noted in the *Hobby Lobby* case, "whether the religious belief asserted . . . is reasonable" is a question the federal courts "have no business addressing."

In essence, the Tenth Circuit said that it was willing to tolerate the nuns' religious liberty only when it considered their beliefs important — for example, the court judged as important the nuns' belief that it is a violation of their faith to directly

provide their employees with abortion-inducing drugs. But in *Little Sisters of the Poor v. Burwell*, the Tenth Circuit was not willing to allow the nuns religious liberty because it found that the sins that the regulation would force them to commit were theologically insubstantial. This is exactly the sort of ad hoc "indulgence" that occurred in *Stormans* and that George Washington promised American Jews would never have to rely on.

On appeal, the Supreme Court could have held that the Tenth Circuit engaged in an impermissible and extralegal religious inquiry. Instead, however, the Supreme Court refused to rule on the merits of the case and merely sent it back to the lower court while instructing the parties to attempt to "resolve any outstanding issues between them." In doing so, the Court left the door open for other courts to repeat the Tenth Circuit's mistake. Unfortunately, that is exactly what happened in the *Ben-Levi v. Brown* case.

The *Ben-Levi* case involved a Jewish prisoner named Israel Ben-Levi who was prohibited from organizing a Bible-study group for Jewish inmates.

The district court concluded that, contrary to his claims, Ben-Levi suffered no harm because, in the court's understanding, Jewish law *prohibited* individuals from studying the Bible in the absence of ten men or a rabbi. The court believed that the prison had acted to ensure "the purity of the doctrinal message and teaching." This conclusion is factually inaccurate. Any practicing Jew, regardless of denomination, understands that there is no such requirement for the study of sacred texts in Judaism.

The most troubling element of this case, however, is not just that the court got the facts wrong. The main problem is that the court refused to respect Ben-Levi's understanding of his own faith. The court, just like the courts in *Stormans* and *Little Sisters of the Poor,* decided that it had to protect religious liberty only when it determined that it was worthwhile to do so. Owing to the court's impermissible inquiry, it allowed the prison to permit Bible study for Christians but not for Jews.

The fourth case mentioned above, and the most recent manifestation of this trend, occurred in *U.S. v. Sterling.* That case involved a Christian Marine who was prohibited from placing printouts featuring Biblical verses on her desk. The United

States Court of Appeals for the Armed Forces accepted the plaintiff's claim that her desire to put the verses on her desk represented a sincere religious belief. Yet the court still declined to grant the plaintiff an accommodation because, in its opinion, she had failed to prove that her religious belief was "important" enough to merit protection.

Once again, the court did not determine that the government had a compelling interest that required it to burden the plaintiff's religious liberty. Instead, it determined that the plaintiff had failed to prove that the "religious costs" of removing the verses were substantial enough to merit legal protection. The court rejected the argument that the government must always demonstrate a compelling need in order to force an adherent to violate her religious faith. Instead, it held that such a justification is necessary only if the Court determines that the religious practice being prohibited is "important" or imposes high "religious costs."

This disregard for and ignorance of religious doctrine is particularly alarming for practitioners of Judaism, a religion with a large number of details that are complex and largely unknown to the general public. For example, Orthodox Jews consider using electricity on the Sabbath to be a possible violation of the Ten Commandments and a grave sin. Yet a judge on the Fifth Circuit Court of Appeals chose the example of a government regulation that would require Americans to turn a light switch on and off every day as a case unlikely to implicate religious liberty. This judge certainly did not have Orthodox Jews in mind when he raised that hypothetical; he simply was unaware of the strictures of Orthodox Judaism. That ignorance highlights why even the most benevolent and legally knowledgeable judges are ill equipped to make such theological determinations.

RELIGIOUS MINORITIES MUST UNITE TO PRESERVE FREEDOM

The cases discussed above involve real usurpations of religious liberty that have already occurred. They serve as early warning signs of a dangerous shift under way in many Americans' views on religious liberty. We are moving away from George Washington's understanding of religious liberty as a fundamental right, and we are

advancing toward an understanding of this freedom as a mere matter of indulgence. This explains why some organizations have called for courts to "balance" between religious liberty and other interests, as if religious liberty were merely one of numerous legitimate governmental considerations. Some, including Justice Ruth Bader Ginsburg, have even gone so far as to suggest that religious liberty should give way whenever a religious adherent's practices "detrimentally affect" another person.

All Americans ought to reject this shift, but it is particularly vital for members of religious minorities to stand united in defense of traditional notions of religious liberty. Such minorities would suffer most if the traditional view were lost.

Representatives of religious minorities ought to offer a unified front in support of people such as Iknoor Singh, a Sikh college student who sued to be able to enroll in the Army ROTC without cutting his hair, shaving his beard, or removing his turban — an accommodation that the U.S. Army has successfully offered Sikh soldiers in the past. We ought to support people such as Masood Syed, a Muslim NYPD officer who was suspended for refusing to shave his beard (he was eventually reinstated). We ought to support people such as Calvert Potter, a Muslim firefighter who won the right to wear a beard that did not interfere with his equipment. We ought to support people such as the Alabama-Coushatta tribe of Texas, who want their children to be able to attend public school while wearing long hair.

Long gone are the days when religious sects may have had opposing interests with regard to religious liberty. In 2016, the interests of all religious people are aligned. As the cases above demonstrate, those Americans who have decided that they can no longer indulge their neighbors' religious freedom do not distinguish between Jews, Muslims, and Christians. They are trying to strip religious liberty from believers of every faith.

The same reasoning that doomed nuns in the Tenth Circuit doomed the Jewish Ben-Levi in the Fourth Circuit. This same reasoning may next doom the parents who want to circumcise their child, the butcher who wants to ritually slaughter an animal, or the worker who refuses to work on the Jewish Sabbath but still wants to receive unemployment benefits. The same hostility that has banished many Christian (and

potentially Orthodox Jewish) pharmacists from Washington State may very well target Jewish pharmacists around the country.

Some European countries have already banned or discussed banning Jewish and Muslim ritual slaughter and circumcision. Most American Jews now see these bans as unthinkable in their own society. Yet enlightened Europeans found them unthinkable not long ago. If we do not succeed in protecting religious liberty as a fundamental right, there is no logical reason such bans will not become quite thinkable in America. In fact, the city of San Francisco has already discussed a ban on circumcision.

Jews cannot pretend that this issue does not affect them; they must not assume that their Christian neighbors will carry the burden of defending religious liberty on their own. All Americans have a role to play in defending religious liberty. It is time for more Jews and other religious minorities to get off the sidelines and into the game.

— *Mitchell Rocklin is a rabbi and a research fellow and doctoral student in New York City. He is also a chaplain in the Army Reserve and a member of the Rabbinical Council of America's Executive Committee. The opinions expressed are his own. Howard Slugh is an attorney practicing in Washington, D.C.*