
THE GROWING CLASH BETWEEN RELIGIOUS FREEDOM AND THE GAY MOVEMENT

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GEORGE W. DENT, JR.*: I want to thank the Federalist Society for inviting me today. At many law schools only one side of the ideological spectrum is presented. Often the Federalist Society is the only organization that offers a diversity of viewpoints and debate, and I think that's extremely valuable.

Just a few years ago when I started mentioning the war between the gay movement and religious freedom, many people asked, "What war?" With the vicious backlash after the passage of Proposition 8 restoring traditional marriage in California, not many people ask that now. The war has escalated quickly. My law review article about it, published about three years ago, was almost 100 pages and 600 footnotes long. It is already out of date because of so many recent developments.

This is not a war that boils down to a single legal issue that might be resolved in a big showdown, an Armageddon, a Supreme Court decision that would resolve the issue one way or the other and in which one side would obliterate the other. Rather, it is being fought out in innumerable skirmishes over state laws, local ordinances, and workplace regulations.

I apologize in advance to those who find my coverage here superficial, but the complexity of the conflict makes that inevitable in a short talk. It also necessitates some gross generalizations about the warring parties. I will refer occasionally to the gay movement and religious traditionalists, but I realize these are not at all monolithic camps. There is a wide range of attitudes in each, so much so that it is perhaps dubious to refer to them as single camps. But that, too, is inevitable in a talk of this scope.

The starting point for religious freedom is, of course, the First Amendment of the Constitution, which says, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." However, as those of you who have taken constitutional law probably know, in *Employment Division v. Smith* the Supreme Court virtually gutted the Free Exercise Clause by ruling that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general application on the ground that the law forbids conduct that his religion requires.¹

What this means, for example, is that a jurisdiction may, if it pleases, forbid all consumption of alcohol, even in the Catholic Mass and the Jewish Seder. In practice legislative exemptions from such laws are common, but they are not constitutionally required. On the other side, the Supreme Court has never ruled that homosexuality is a suspect category for purposes of equal protection. Accordingly, laws that employ that category, like laws limiting legal recognition of marriages to those between a man and a woman, are subject only to the lenient rational purpose test, which in most cases is easily met.

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Again, however, legislatures are free to afford equal treatment to homosexuality. They can also generally forbid discrimination on the basis of sexual orientation, and many state and local legislatures have done so.

In short, the Constitution as currently construed leaves a big range of legislative discretion in the clash between the gay movement and religious freedom. The Supreme Court could change that somewhat by expanding the protection of free exercise of religion or making homosexuality a suspect category or both. However, I don't think that is likely to happen in the next few years. And even if it does happen somewhere down the road, it will probably still leave a large range of legislative discretion. In sum, the war between the gay movement and religious freedom will probably drag on for decades in many battles, most of them small and local.

How should we start to think about balancing the competing interests in this war? Let us begin with the fundamental ideals that underlie our Constitution. Religious freedom was considered indispensable by the Founders.² Indeed, they made it the first liberty protected in the Bill of Rights,³ so that religious liberty is often called the first freedom. By contrast, the Founders did not consider homosexuality worthy of protection. For the most part, they considered it odious, and it was a crime in most states. Of course, attitudes change, as we have seen with respect to race and gender, and I think it is appropriate for the Supreme Court to follow these changes. It did so in the *Lawrence v. Texas*⁴ when it struck down laws making homosexual acts a crime. Most states had already repealed their laws against sodomy, and the laws that remained were almost never enforced. Those laws then became sources of arbitrary intimidation by law enforcement officers. The public reaction to the *Lawrence* decision is significant. There was some grumbling about the Supreme Court's reasoning, but virtually no agitation to reverse it. Contrast the reaction to the decision of the California Supreme Court requiring recognition of gay marriages, which the public overruled within months through a referendum (Proposition 8) amending the state constitution.

Likewise, society is gradually moving toward a view that many kinds of discrimination against homosexuality are improper—many, but not all. This is where the clash with religious liberty arises. In this clash one could, perhaps, embrace absolutely one side or the other. On one side one could argue that churches, synagogues, and mosques must not discriminate against gays in the clergy or refuse to perform gay marriages. On the other side, one could say that the public school principal may decline to hire gay teachers if hiring them would offend her personal religious beliefs. However, very few people take either of these absolute positions.

For most of us the question is how to draw the line—how to balance the competing interests. This requires delving into the details, into the relevant considerations that vary from one context to another. To take my two extreme cases, for example, a public school principal, or any public official, generally has no business hiring people on the basis of her own religious beliefs.

On the other side, religious freedom means nothing if it does not allow a church to decide by what ideals its clergy will live.

What about the tougher situations? Consider first the private workplace. No federal law prohibits discrimination on the basis of sexual activity, although Congress is considering a proposed Employment Non-Discrimination Act (ENDA), which would add sexual orientation as a prohibited basis of discrimination in the civil rights laws. Many state and municipal laws already forbid such discrimination in employment. On the other side, Title VII forbids discrimination on the basis of religion.⁵ However, Title VII does not require an employer to accommodate an employee's religious practice if the cost would be more than *de minimis*.⁶ As a result, very few employer refusals to accommodate have been held illegal by the courts.

What does this mean in practice? Hewlett-Packard had a diversity campaign that included approval of homosexuals. An employee, Richard Peterson, indicated his views on this by posting, in his own cubicle, passages from the Bible condemning homosexuality; he was fired. He sued under Title VII and lost. The court said HP did not have to tolerate these postings because there were intended to be demeaning and degrading and to generate a hostile and intolerant work environment.⁷ In effect, the court deemed the Bible to be hate speech. One wonders if Peterson has a right under the statute to indicate in *any* way his reservations about the company policy.

In this case, the policy was imposed by the employer, not by law. However, given the court's comments, the employer might have had to fire Peterson if there had been an antidiscrimination law like ENDA in place. At the least, an employer would invite a nasty, costly lawsuit by a homosexual employee claiming workplace harassment if the employer did not fire an employee like Peterson. Thus such laws are likely to lead employers to forbid any expression of religious disapproval of homosexuality, even if the expression is quite obscure.

Consider also two employees of an Oakland, California, public agency who posted on a bulletin board for such things a notice about their employee association that was "a forum for people of faith to express their views on contemporary issues of the day, with respect for the natural family and family values." The agency removed this notice, saying it contained statements of a homophobic nature that promote sexual orientation-based harassment. They, too, sued and lost.⁸ One wonders whether the plaintiffs could have used any language that would have satisfied the court and still conveyed the purpose of their group.

Public schools and universities have also been frequent battlegrounds. Several universities have refused recognition to student religious groups because their membership criteria exclude students who condone homosexuality. It is not illegal for someone to eat meat or be a Republican, but a student vegetarian society or Democratic club can exclude such people because they don't support the group's objectives. Why, then, cannot a student religious group exclude those who do not share its beliefs? Fortunately, a few court cases have held that such university rules are unconstitutional, but the issue is far from settled.⁹ Related cases have involved access to school facilities and funds.¹⁰ Many colleges also forbid speech that

might offend others on grounds that include sexual orientation. That, of course, puts a terrible chill on free speech. Fortunately, every such code that has been challenged in court has been struck down,¹¹ including, I'm sorry to say, one at this august university.¹²

K-12 is a different story. A California public school district decreed observance of the annual Day of Silence, an event intended to condone homosexuality. A student, Tyler Harper, opposed this, and on that day wore a T-shirt reading, "I will not accept what God has condemned—homosexuality is shameful," with a citation to the relevant passage from one of St. Paul's epistles. When he refused an order to remove the shirt, he was confined to the principal's office for the day. The next day he wore a shirt with a different but similar message and was sent home.

The Supreme Court has said that public school students do not shed their right to free speech at the schoolhouse gate.¹³ They may express themselves, unless their expression would interfere with school work or impinge on the rights of others. On this basis, Tyler Harper sued and lost. The court conceded that students have some rights of free speech. It said, for example, that a school must permit a statement, "Young Republicans suck;" that would be constitutionally protected. But Tyler Harper's T-shirt could be barred because it attacked high school students who are members of a minority group that has been oppressed throughout history.¹⁴

Note that Tyler Harper, like Richard Peterson at Hewlett-Packard, did not initiate the discussion of this topic. They were both reacting to official activity—in Tyler's case, to official school activity that offended his religion. So in this case the court held, in effect, that the school can openly espouse one side of a public debate, then silence students who wish to dissent and say something on behalf of the other side of the debate, even though they were motivated by their deepest beliefs. Public schools, I thought, are supposed to teach children about liberty. What message do they communicate and what lesson do children learn when the public schools themselves suppress students' liberty?

A third contested area is government contracting. Many children available for adoption are easy to place. Catholic Charities of Massachusetts was for many years highly effective in finding homes for disabled, older, and unruly children who were much more difficult. Then, the Massachusetts funding agency ordered Catholic Charities to give equal treatment to gay couples that wanted to adopt. Catholic Charities' religious principles prevented that, and it could not continue without government money, so it closed its doors.¹⁵ Note that there were other adoption agencies that were happy to serve gay couples. The state's action served only to destroy one of its most effective partners.

A fourth battlefield is government licensing and regulation of people trying to earn a living. In Los Angeles, a medical internist refused to inseminate a lesbian because of religious objections to inseminating an unmarried woman. When threatened with the loss of her license, she sued and lost.¹⁶ The court ruled that she had no right to refuse treatment on religious

grounds. And in Albuquerque, New Mexico, the state sued and obtained a judgment against a photographer who declined to photograph a lesbian wedding.¹⁷

Note that the insemination case was not a medical emergency where a denial of treatment would have caused medical injury. In both these cases, the defendant was offering services that were readily available elsewhere in the community. In both cases, the complainants hunted down professionals whose religion did not condone the gay movement and invoked the coercive power of the State, not because they had been denied services they could not obtain elsewhere, but to force the defendants to publicly violate their faith. The goal overtly is to ostracize, to make pariahs of people of traditional faith.

The last war zone I will mention is use of public facilities. In several places, the Boy Scouts and similar scouting groups have been denied access to public facilities because they do not accept as Scout leaders anyone who rejects their moral code, which does not approve homosexuality.¹⁸ The Scouts perform an important service. For many children whose lives do not offer much opportunity for wholesome recreation, the Scouts offer an outlet, a refuge. Shutting them down denies this opportunity.

There are other categories and many other cases I could mention, but I think I've given you some idea of the nature of this war. Let me return now to the basic question of how we should think about this war. First, all people deserve to be treated with decency and civility, and I think that discrimination based on sexual orientation is generally wrong and should be illegal in some cases, including employment in most government jobs and maybe in large private firms.

However, the situation of homosexuals now is very different from that of African-Americans 50 years ago when the federal civil rights laws were first adopted. For one thing, race is usually apparent just by looking at a person. Sexual orientation is not. Also, African-Americans did, and still do, lag far behind whites in income, while gays overall have average or above-average incomes. Discrimination is certainly often infuriating to homosexuals, but it is not a major systemic economic phenomenon.

On the other side, religious liberty has long been considered essential in America and in all free societies. America was peopled in large part by Puritans, Baptists, Quakers, Maryland Catholics and others yearning to practice their religion without government oppression. Again, religion was made the first freedom by the framers of the Bill of Rights, and since then America has often been replenished by refugees seeking religious freedom.

Religion has often played a leading role in our political history, including the Abolition and Civil Rights Movements. And religion has often been a basis for exemption from general legal obligations, even onerous ones, like the conscientious objector exemption from military service even in times of war. So laws forbidding sexual orientation discrimination should not be drafted or construed to forbid individual expressions of religious belief and exercise of religious conscience in such times, places, and manner where expressions of opinion and actions about, say, politics and sports would be permitted.

Where antidiscrimination laws do apply to smaller private organizations, there should be an exemption not only for churches but for organizations like Catholic Charities and the Boy Scouts that have a religious orientation, unless they provide important services that are not available elsewhere.

That is just a brief, general sketch of a proposal that I have worked out in greater detail in writing and hope to continue to develop, but I think I have given you an idea of what the issues are and of my own views on them.

Thank you.

Endnotes

- 1 494 U.S. 872, 879 (1990).
- 2 See JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 49-57 (1996) (describing the importance of religious freedom to the Founders).
- 3 U.S. CONST., amend. I.
- 4 539 U.S. 558 (2003).
- 5 42 U.S.C. § 2000e-2(a) (2000).
- 6 *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1997).
- 7 *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).
- 8 *Good News Employee Ass'n v. Hicks*, No. C-03-3542 VRW, 2005 WL 351743 (N.D. Cal. Feb. 14, 2005).
- 9 See George Dent, *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 Ky. L.J. 596 (2007). See also *Truth v. Kent Sch. Dist.*, No. 04-35876 (9th Cir. 2008) (holding that a public school may refuse to recognize a student organization based on religion).
- 10 See *id.* at 608.
- 11 See *id.* at 603-08.
- 12 See *UWM Post v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).
- 13 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
- 14 *Harper v. Poway Unified Sch. Dist.*, 345 F. Supp.2d 1096 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006).
- 15 See Patricia Wen, *They Cared for Children: Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1.
- 16 *North Coast Women's Care Medical Group v. San Diego Super. Court*, 189 P.3d 959 (Cal. 2008).
- 17 *Willock v. Elaine Photog.*, (N. Mex. Human Rights Comm'n 2009), available at <http://volokh.com/files/willockopinion.pdf> (last visited May 18, 2009).
- 18 See Dent, *supra* note 9, at 592-95.

