
RELIGIOUS LIBERTIES

I, PLAINTIFF: A CHAT WITH JOSHUA DAVEY

CONDUCTED BY SUSANNA DOKUPIL ON MAY 21, 2004

The State of Washington's Promise Scholarship program thrust Joshua Davey into the legal spotlight as a college freshman. Washington grants Promise Scholarships to students who meet certain achievement and income criteria and attend an accredited in-state institution, but it denies otherwise-qualified students this award if they declare a major in theology. Davey received the Promise Scholarship, but upon his matriculation to Northwest College, he discovered that he had to give up his award because he intended to double major in Business Management and Pastoral Ministries (a major in theology). Davey sued state officials to recover his scholarship on the basis that the State's program violated his constitutional rights under the Free Exercise Clause, Establishment Clause, Free Speech Clause, and Equal Protection Clause. He claimed that the program discriminated against him on the basis of the religious perspective of his major. Unfortunately for Davey, the Supreme Court ruled against him last winter in Locke v. Davey, No. 02-1315 (February 24, 2004). Susanna Dokupil caught up with Joshua Davey in a telephone interview shortly after he completed his final exams as a first-year student at Harvard Law School.

SD: How did your finals go?

DAVEY: Pretty well, I think. I felt good about them. It's a little hard to tell how the grades will come back, but I'm glad to have those done with.

SD: Absolutely. Are you going to take the law review competition?

DAVEY: I won't be doing the law review competition, actually. I'm involved with another journal that I want to pursue.

SD: What journal?

DAVEY: *The Journal of Law & Public Policy*. I hope to be actively involved with that. And being married, I didn't want the commitment of the law review.

SD: Did you meet your wife at Northwest College?

DAVEY: We actually met in junior high school, and we got married after the first year of college.

SD: That's great. Did she go to the same college as you?

DAVEY: Yes, she did.

SD: What other activities have you been involved in at law school?

DAVEY: Well, I'm pretty involved with the Federalist Society and the *Journal of Law and Public Policy* — the Society for Law, Life and Religion, as well. I've been busy doing a lot of things in my case in response to media interviews, writing articles, and things of that sort.

SD: I imagine you would be the perfect person to write a case note.

DAVEY: Actually, I'm hoping to do that this summer, so it may be published in the JLPP next year.

SD: Excellent. What kind of law do you think you want to practice?

DAVEY: I think I'm interested in litigation, and it'll probably be a firm at first, and then perhaps religious liberties work down the road.

SD: Where are you working this summer?

DAVEY: I'll be working at the Becket Fund for Religious Liberty in Washington, DC. What I'm doing is part of a program through the Alliance Defense Fund, which always does religious litigation. It's called the Blackstone Fellowship, and we go to ADF headquarters for a couple weeks for training, and then I'll be at the Becket Fund for six weeks, and then a debrief at the ADF headquarters again. It's a great program. Five students from Harvard are doing that this summer.

SD: Do you want to do appellate work or trial work?

DAVEY: I think appellate work would be the most interesting down the road, but we'll see where my career takes me. So, there are a lot of doors open at this point.

SD: Are most of the students at Northwest College evangelical Christians?

DAVEY: Yes.

SD: What struck you most about the difference between the environment at Northwest versus Harvard?

DAVEY: Well, because Northwest is an evangelical Christian school, Christianity was pervasive throughout the school. It influenced the way the teachers taught, what you talked about in the classroom, going to chapel. The whole atmosphere was one of thinking about how to apply one's faith to one's life in whatever capacity that might be.

At Harvard, I don't think there's a lot of thought given to that. Those people who do have religious faith are left on their own, I think, in terms of how to figure out what that means, if anything, for the way they live their life and the way they pursue their career.

SD: Which environment do you think has strengthened your faith more?

DAVEY: Well, I think they both strengthened my faith in different ways because Northwest laid a foundation in a sense, and Harvard has allowed and continues to allow me to rework those aspects of the foundation, to question things that I maybe should be thinking about, to reason through and think through why I believe what I believe. In that sense, it really strengthens my faith, having to deal with a lot more diversity and a lot more hostility toward religious faith than I dealt with at Northwest.

SD: Had you thought much about your political orientation before law school?

DAVEY: Well, I had always sort of leaned conservative, and generally Republican before law school, and—well, before college; it had been based mostly upon moral concerns, and those are still huge concerns for me—but I think my political perspective has been broadened through the study of law, and to think about the way we do law and what law should mean and serious jurisprudence and those kinds of things. And those also have led me in a conservative direction. But those were kind of reinforcements I got from another angle.

SD: Tell me about the Four-Square denomination. I know that it's similar to Assemblies of God, but what are the basic tenets of that faith?

DAVEY: Basically, the Four-Square denomination arose out of the Pentecostal movement of the early 20th Century. It's very similar to Assemblies of God. It's a pretty typical evangelical Christian denomination, or a pretty typical Pentecostal denomination. They believe all the traditional tenets of Christianity, and it places an emphasis on the work of the Holy Spirit in church today, including the manifestations of that, which is healing or speaking in tongues or some of these other kinds of physical signs of the work of the Holy Spirit. That's what has historically categorized the Pentecostal movement.

SD: And Northwest is an Assemblies of God college?

DAVEY: That's correct.

SD: Now that you're in Boston, have you joined a church there?

DAVEY: Yes. We go to Park Street Church here in Boston.

SD: Since you started college intending to be a minister, how does that mesh with your study of law now?

DAVEY: Well, I think in a couple of ways. Many of the techniques, interestingly, of biblical interpretation I think are applicable to legal interpretation: focus on the intent of the author, what the message that's trying to be communicated is, some of those skills apply very much in law, as well as they do in biblical studies.

I also think that the reasons that I had wanted to pursue a career in ministry—that is, to live my faith out through my career, to help people, and to make a positive contribution to society through what I did with my life—are also applicable to a career in the law.

SD: Do you view being a lawyer as a religious calling?

DAVEY: I think I do. I think as a Christian, my faith does and has to influence everything that I do, and so it's really impossible for me to separate out completely a sort of secular life in the law from who I am as a Christian. I do think of it as a religious calling in that sense.

SD: Do you think you might go to seminary in the future?

DAVEY: I may. I did a degree in religion and philoso-

phy undergrad; my wife is in seminary now. So, who knows what will be in store for me down the road. There are no definite plans to do that at this point, though.

SD: How did you choose Jay Sekulow to represent you?

DAVEY: Well, I was familiar with his work, heard his program on the radio—he does a daily radio show where he discusses religious liberties issues and some cases that he’s working on—and really his organization was the only one that I knew of at the time that did this sort of thing, and they were the first people I contacted, and they agreed to take the case so I didn’t need to look further. But he was definitely a good decision and did a good job representing me.

SD: The Supreme Court focused on how you could have prepared for the ministry and studied business administration at two separate colleges and keep your Promise Scholarship. Now, how realistic was that?

DAVEY: It’s not very realistic. It’s an extremely inconvenient arrangement. Because I did not investigate it, I don’t know if it would have been possible for me to arrange that. I’m sure it would have been very inconvenient, and as Justice Scalia pointed out in dissent, it really is depriving me of the primary benefit of the Promise Scholarship; that is, pursuing the degree I wanted at the college I wanted to study at. So, I think while the majority focused on the fact that it’s theoretically possible, it really misses the point of what the scholarship is about, and what the discrimination in this case is about.

SD: How close was the nearest college to Northwest?

DAVEY: Let me think. The nearest large school was the University of Washington, which is across Lake Washington from Northwest, and maybe a 20- to 40-minute drive depending on traffic.

SD: Did you attend the oral argument in your case?

DAVEY: I did. I was at the oral argument in December.

SD: What did you think?

DAVEY: It was awe-inspiring to be there at the Court and see the Justices. It’s the first time I’d been to an argument. I’d been to the Supreme Court before, but never to see an argument.

And then, it was also surreal because it was my

case that they were talking about. I was sitting there in the gallery, and they’re discussing me and my scholarship and everything. It was a fun experience. I enjoyed it, and it was good to be there and see an argument and to be a participant in the process. It was a lot of fun.

SD: Did you speculate about the vote on the case before it came out?

DAVEY: Well, I did. We were pretty confident, actually, leaving oral argument, based on *Zelman* and some other cases that various Justices had been a part of. We thought—we were fairly confident that we had four votes, of course, looking to O’Connor as sort of the swing vote, so we were a little disappointed when it came back 7-2. But I guess that’s the way it goes sometimes.

SD: I don’t think you were the only one who was surprised.

DAVEY: I think that is true. A lot of the media people I spoke with and other lawyers who do this kind of work were surprised by the outcome.

SD: Well, since you didn’t keep the scholarship, what did you have to do to make up for the money you lost?

DAVEY: Making up for the money came in a couple of ways, you know, some additional student loans, a little more working outside of school than I had maybe thought I would do originally. Those two are the main ways I made up for it.

SD: And how did that impact your undergraduate experience?

DAVEY: It did force me to spend a little more time working, so that’s a little less time studying and a little less time doing school activities and associating with people there at school, and a little more debt to pay back later on. So, it’s definitely a negative thing. Of course, it didn’t cause me to drop out of school or anything like that, so the impact was relatively minor but it was certainly significant to the tune of nearly \$3,000.

SD: Did you know anybody else who received a Promise Scholarship who had to work during the school year like you did?

DAVEY: There was at least one other student that I know who was promised as scholarship-eligible, and who did have an outside job. I’m not sure what happened with his situation, whether or not he ended up changing his

major and continued to receive the scholarship or not. I also was told by the director of financial aid at Northwest that there, I think, were five students my year who were in my situation, having to make a decision either to change their major or to lose their scholarship. And I think most of them elected to change their major, but I'm not certain about that. I think there were three who I'm pretty sure did change their major. The other guy, I'm not certain about. And then there was me, who did not.

SD: The Court's opinion suggested that they thought that the burden on you was *de minimis*. Maybe they don't think \$3,000 was a lot of money. Do you think that was a good way of approaching the —

DAVEY: I don't think that is. The \$3,000 is pretty significant to any college student, and I'm not really sure how they can say that with a straight face because I think that is a pretty significant burden on the free exercise of religion.

SD: So, would you say that the Court is a bunch of wealthy elites out of touch with Middle America?

DAVEY: Well, out of touch is a good way of putting it. They may be wealthy elites. I'm not certain about that.

But I think insofar as the majority of America is religious, and the reactions of people that I've talked to just sort of on a popular level, were uniformly that the state's policy was quite unfair. I think as far as those things are true, then, yes, the Court's out of touch.

SD: Do you feel that their ruling in any way impacted what the statute was designed to do in terms of making college affordable for people who otherwise wouldn't be able to go? I mean, you obviously were still able to go to college, but do you think that there were other people who would not be able to go, if they had to give up that money?

DAVEY: There might be some. I think probably most of those students—the choice that many people are going to face is studying what they really want to study, theology, or studying some other state-approved program. Most of them may still be able to go to school, but they're not going to be able to study what they really want to study with the scholarship that they earned.

SD: Now that you've had a year of law school, what is your assessment of the opinion?

DAVEY: I dislike it both for its result and for its message,

its jurisprudential philosophy. I think it's really out of sync with the rest of the Court's church and state jurisprudence as far as I understand it. The way they distinguish *Lukumi*, for example, which is hard to imagine how—here, I agree with Justice Scalia—how the withholding of a public benefit is really different from the imposition of a penalty, like you had in *Lukumi*. And they just glossed over that; [the Court] didn't even need to get into strict scrutiny at all. This emphasis on history, it seems like the Court is pulling that out because they want to find some justification to go against me, even though the weight of the precedent would be in my favor.

And also, there's just a complete lack—the failure of the Court to address the *Rosenberger* argument of a forum. Maybe they didn't think it was convincing at all, but it would have been nice to have something there in the way of the Court's assessment of the argument. But it was relegated to a footnote.

So, for all of those reasons, I thought the opinion was a bad opinion from a jurisprudential standpoint, as well as its outcome.

SD: So, even though you obviously disagree with the policy implications, you would also argue that the legal analysis rested on shaky ground?

DAVEY: I think it did.

SD: Could you reflect for me on the task of integrating faith and legal education?

DAVEY: It's a big task, and it's difficult to know how to do as an evangelical because there have been few evangelicals who have done it and done it well. So, for most evangelical Christians, we're looking at a lot of Catholic thinkers, who have long been much more successful in modeling this sort of integration of faith and the law. It's a task that reaches everything that we think about law and the way we think about law.

Like I mentioned before, I think the Christian faith should permeate everything that we think and do and should inform the way we do law, both from the policy angle and from sort of the methodology behind it, as well.

SD: So, what is the appropriate methodology?

DAVEY: I think from a methodological standpoint, you have to look at the textual analysis; you have to pay attention to the words of the law; the statutes of the Constitu-

tion; you have to look at original meaning behind all of those things when you're doing legal analysis.

SD: Is there anything else that you'd like to say to the world?

DAVEY: Just that I think that this case is important because I think the free exercise of religion is important. I think that this case seems to be another in a line of cases that really minimize that constitutional right in comparison with some other rights that may or may not be in the Constitution.

I think that fortunately the opinion is narrow enough that the main arena in which my case could have had really positive effects — namely, school vouchers — is more or less left where it was before *Davey*. After *Zelman*, of course, my case seemed to present the next logical question. [*Zelman* asks] is it constitutional for schools to include religious organizations in public benefits programs without violating the Establishment Clause. *Davey* asks: Must we then include them in order to avoid violating the Free Exercise Clause? Of course, my case says no to that, but you still see *Zelman* holding intact, where states are free to do this, the negative result of my case of course being that instead of a national Supreme Court precedent benefiting school vouchers, you have to fight it on a state-by-state level. Fortunately, I think the impact of my case in that regard is relatively minimal.

SD: A number of scholars would argue that your case, since it was narrowly written, isn't going to have much of an impact in that direction. Do you think that's probably right, or do you think that's wishful thinking?

DAVEY: That seems right to me. It depends on how the court interprets this language and how far they're willing to go with this principle, you know, of protecting the conscience of the taxpayers. Those two things, I think, are dangerous ideas. If the Court really keeps a tight rein on them, then I think things will be okay in that regard, but I think there are ideas that could be blown up way beyond what's ever envisioned in my case.