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Tolerance: The Bridge Between Religious Liberty and Privacy

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TOLERANCE: THE BRIDGE BETWEEN RELIGIOUS LIBERTY AND PRIVACY

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Recently, a cartoon in *The New Yorker* pictured two portly gentlemen in their senior years standing at the helm of a speeding motorboat. One turned to the other and said: "I took a look at the First Amendment the other day, and some of that stuff isn't funny." The motorboat man was right; there are things in the first amendment[1] that are not funny, and they were not intended to be.

The clause of the first amendment that is most familiar and most frequently the center of controversy is the free speech clause. It provides that "Congress shall make no law abridging the freedom of speech."[2] A recent example of the controversy surrounding the free speech clause occurred last term when the Supreme Court overturned a flag burning conviction under a Texas criminal statute[3] on the ground that it violated the free speech provision of the first amendment. The Court's decision immediately prompted President Bush and some members of Congress to seek a constitutional amendment that would permit states to criminalize flag burning.[4]

Controversies, such as the one described above, continue to arise due in large part to the Supreme Court's construction of the free speech clause. By its terms, the clause prohibits Congress from passing any law that abridges freedom of speech. Indeed, if one wanted to write a statement absolutely prohibiting Congress from passing laws that abridged free speech, one would be hard pressed to improve upon the modest ten words selected by the drafters of the first amendment. And yet, it is a cornerstone of first amendment jurisprudence that

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* Professor of Law, Cardozo Law School. I wish to thank Sandy Cobden and Paul Brusiloff, two Cardozo students, for their help in preparing the footnotes.

1 U.S. Const. amend. I.

2 Id.

3 Texas v. Johnson, 109 S. Ct. 2533 (1989).

4 E.g., Bush Seeking Way to Circumvent Court's Decision on Flag Burning, N.Y. Times, June 27, 1989, at A1, col. 1. Instead of immediately seeking a constitutional amendment, Congress has enacted the Flag Protection Act of 1989, 18 U.S.C. § 700 (1989). On June 11, 1990, the Supreme Court struck down this statute, too. United States v. Eichman 58 U.S.L.W. 4774 (1990). Following the Court's decision, President Bush and various members of Congress again called for a constitutional amendment that would allow states to prohibit flag-burning. See N.Y. Times, June 12, 1990 at B6, col. 1. At the time of publication, their call has been unheeded.

Congress may pass *some* laws abridging speech.[5]

The peculiarity of this interpretation was highlighted in an exchange between Justice Black, well known for his insistence that the Court should literally interpret the first amendment, and Solicitor General Erwin Griswold in the *Pentagon Papers Case*.[6] It was Saturday morning, June 26, 1971, and it was the last time Justice Black participated in a Supreme Court decision before he resigned from the bench.[7] The government was trying to stop *The New York Times* and *The Washington Post* from publishing excerpts from the Pentagon's top secret history of the Vietnam War.[8] Justice Black had asked Solicitor General Griswold whether he wasn't asking the Court to become a "censorship board." Griswold objected to Black's turn of phrase and replied that he thought that was a rather "pejorative way to put it." Griswold then went on to say: "The problem in this case is the construction of the First Amendment. Now, Mr. Justice Black, your construction of that is well known, and I certainly respect it. You say that 'no law' means 'no law,' and that should be obvious," to which Black stated: "I rather thought that." Griswold, a lion in his own right, replied: "And I can only say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law.' And I would seek to persuade the Court that that is true."[9]

The first amendment contains another cantankerous clause, the one most relevant to this conference, which bars Congress from establishing a religion or prohibiting the free exercise of religion. The language of this clause is as absolute as the free speech clause: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."[10] Nevertheless, courts across the nation have interpreted the term "no law" in the religion clauses no more literally than they have in the free speech clause.[11]

As Professor Firmage has noted, many nineteenth century courts, some within a generation of the adoption of the religion

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5 For decisions that explicitly state this proposition, see, e.g., Cox v. Louisiana, 379 U.S. 536, 554 (1964); Dennis v. United States, 341 U.S. 494, 503 (1951) (Vinson, C.J., writing for a plurality); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

6 New York Times Co. v. United States [The Pentagon Papers Case], 403 U.S. 713 (1971).

7 See H. Ball, The Vision and the Dream of Justice Hugo L. Black 11 (1975); G. Dunne, Hugo Black and the Judicial Revolution 429-32 (1981).

8 *Pentagon Papers*, 403 U.S. at 713.

9 Rebuttal Oral Argument of Erwin N. Griswold, Esq., in 71 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 256, 257 (1975).

10 U.S. Const. amend. I.

11 See, e.g., Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989); Bowen v. Roy, 476 U.S. 693 (1986); Mueller v. Allen, 463 U.S. 388 (1983); Lemon v. Kurtzman, 403 U.S. 713 (1971); Reynolds v. United States, 98 U.S. 145 (1878).

clauses, decided cases on the assumption that "America was a Christian country, and more particularly, a Protestant Christian country."[12] Indeed, Professor Firmage's description of the persecution of the Mormans during the nineteenth century indicates that the free exercise clause did little to impede government action aimed at destroying the Morman church even though it was intended to be an effective shield behind which religious liberty could flourish. Obviously, more is required to guard religious liberty than the wording of the Bill of Rights. What that is, I believe, is a sense of tolerance—tolerance of differences. If the free exercise clause is to be a source of protection for religious liberty, the mind of its interpreter must be tolerant.

But meaningful tolerance cannot be isolated. It is unlikely that the free exercise clause will be given a generous interpretation that endures, unless the sense of tolerance that prompted it infuses interpretations of other clauses of the Constitution. In other words, religious freedom protected by the free exercise clause and individual differences sheltered mainly by the constitutional right of privacy are inter-dependent. These two constitutional doctrines are not usually considered to be closely related. Indeed, they often appear to conflict with each other. Nevertheless, I believe that their destinies are intertwined. The rest of my comments will be devoted to analyzing this relationship.

Before I define the common ground upon which these two values—religious freedom and privacy—rest, I will first illustrate the tensions between them. Religious liberty and individual privacy conflict when the state tries to protect individuals within the community from religious orthodoxy. The Supreme Court's decision in *Wisconsin v. Yoder*[13] illustrates this type of tension. At issue in *Yoder* was a Wisconsin statute that required all children to attend public or private school until the age of sixteen. The Amish refused to permit their children to attend school after the eighth grade. When the constitutionality of the Wisconsin statute was challenged on the ground that it violated the free exercise clause, a divided Supreme Court concluded that the Amish's free exercise claim outweighed the state's interest in mandatory education and, therefore, the Court protected the Amish community from this form of government regulation. Writing for the majority, Chief Justice Burger claimed that a mandatory education

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12 See Firmage, Religion and the Law: The Mormon Experience in the Nineteenth Century, 12 Cardozo L. Rev. 765, 766 (1991) (quoting Berman, Religion and Law: The First Amendment in Historical Perspective, 35 Emory L.J. 777, 783 (1986)).

13 406 U.S. 205 (1972).

requirement posed "a very real threat of undermining the Amish community and religious practice as they exist today"[14] and that the Wisconsin law required the Amish to "either abandon belief and be assimilated into society at large, or . . . to migrate to some other and more tolerant region."[15]

Justice Douglas dissented. He claimed that the essence of the case was the right of each Amish child to be educated so that each could make a reasoned decision as to whether or not to remain within the Amish religious community. He wrote:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.[16]

Burger and Douglas disagreed in their perspective. Burger placed his emphasis on religious liberty and the survival of religious communities. Douglas focused on the protecting the individual within a sheltered community by providing the individual with an education, a prerequisite for making a reasoned judgment. In my judgment, Douglas erred in *Yoder*. Individual privacy must be nurtured, but a pluralist state—even one with a strong heritage of individualism—must support religious liberty if meaningful religious communities are to remain healthy and strong.[17]

The values of religious liberty and individual privacy are in conflict in a second respect. Instead of the state invading a religious community to reorder it in the name of individualism, a religious community may seek to use state power to restrict individual conduct inconsistent with its religious doctrine. For example, although Harry Kalven, Jr. once wrote: "In America there is no heresy, no blas-

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[14] Id. at 218.

[15] Id. If only such an attitude had guided the Court in *Reynolds v. United States*, 98 U.S. 145 (1878), the Court's decision sustaining a polygamy conviction, Professor Firmage might not have had to conclude that Mormons "followed a unique path of development until the world caught up with them and then swallowed and assimilated them." Firmage, supra note 12, at 802.

[16] *Yoder*, 406 U.S. at 245.

[17] There are limits to the free exercise right. The Court would not allow a religious community to make human sacrifices even if such sacrifices are at the core of its dogma. But, obviously, the claim in *Yoder* fell far short of this boundary.

phemy,"[18] that has not always been the case. In *People v. Ruggles*,[19] decided by the New York Supreme Court of Judicature in 1811, Chief Justice Kent sustained a blasphemy conviction against a defendant who said: "*Jesus Christ* was a bastard, and his mother must be a whore . . . ."[20] *Ruggles* is indicative of a pattern that would continue well into the twentieth century. Indeed, as recently as 1971:

> [T]wo [Pennsylvania] shopkeepers were charged with blasphemy for displaying a poster reading: "Jesus Christ—Wanted for sedition, criminal anarchy, vagrancy, and conspiracy to overthrow the established government. Dressed poorly; said to be a carpenter by trade; ill-nourished; associates with common working people, unemployed and bums. Alien; said to be a Jew." After the intervention of the American Civil Liberties Union, the county prosecutor asked that the local magistrate drop the charges.[21]

Although religious communities on occasion are still in conflict with free speech values, the cutting edge of contemporary quarrels between religious communities and individualism is with the right of privacy—that constitutional doctrine that seeks to encompass the libertarian value that Brandeis so eloquently expressed sixty-one years ago as "the right to be let alone."[22] For example, it was not many years ago that the Catholic Church was credited with being primarily responsible for preventing repeal of a Connecticut statute that made it a crime for a doctor to advise a patient on birth control devices and for an individual to use them.[23] This prohibition on the use of contra-

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[18] H. Kalven, Jr., A Worthy Tradition: Freedom of Speech in America 7 (1988). But see Post, Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment, 76 Calif. L. Rev. 297, 314-15 (1988) (arguing that Kalven's statement is inaccurate).

[19] 8 Johns. 225 (N.Y. Sup. Ct. 1811). See also Post, supra note 18, at 315 (discussing the *Ruggles* case).

[20] *Ruggles*, 8 Johns at 225 (emphasis in original). See also Post, supra note 18, at 315 (quoting same).

[21] See Post, supra note 18, at 316-17 (quoting in part from case discussed in L. Levy, Treason Against God: A History of the Offense of Blasphemy 337-38 (1981)). For a further discussion of the development of blasphemy as a criminal offense in England and the United States, see Post, supra note 18, at 305-24 and the sources cited therein.

[22] Brandeis & Warren, The Right to Privacy, 4 Harv. L. Rev. 193, 193 (1890); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also Roe v. Wade, 410 U.S. 113, 152 (1973) (upholding a woman's right to privacy regarding her decision to obtain an abortion during the first two trimesters of pregnancy); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (upholding married couples's right to privacy concerning their decision to use contraceptives).

[23] A historical account of one attempt to amend the statute indicates that religious influences were a predominant factor in the bill's defeat. The bill was first heard by a joint Senate-House committee. The President of the Senate, a devout Catholic, appointed a Senate committee chairman who was hostile to the bill. The House chairwoman was similarly opposed. Another committee member was the brother of the lobbyist for the Catholic Arch-Diocese of Hartford. Despite these obstacles and after bitter debate, the bill was reported favorably by the

ceptives finally was invalidated by the Supreme Court's 1965 decision in *Griswold v. Connecticut*[24]—this time with Douglas writing for the majority. Since then the intersections between religious communities and privacy claims concerning such ignitable subjects as abortion[25] and homosexuality[26] have only intensified.

Despite the obvious clashes, religious liberty and privacy have a common ground. When, in the name of individualism, the state seeks to reorder a religious community (as it did with the Mormons and the Amish), or when the state, at the behest of religious communities, seeks to reorder the community at large (as with blasphemy, abortion, and homosexuality), the same objection is offered to the state action. In both situations, the state is asked to tolerate difference and to recognize the significance of the right to be let alone. In both cases, the state is requested to remain neutral relative to certain conduct out of a sense of respectful tolerance.

The state's response to these requests largely depends upon the

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committee and later passed by the House. Upon reaching the Senate, however, the bill was defeated by a voice vote. The state senate was in large part composed of politicans from Roman Catholic communities. See Comment, The History & Future of the Legal Battle Over Birth Control, 49 Cornell L. Q. 275, 381-82 (1964).

[24] 381 U.S. 479 (1965).

[25] The continuing debate between religious groups opposing abortion and those groups favoring a woman's right to terminate her pregnancy is best illustrated by number of amicus briefs filed in the *Webster v. Reproductive Health Services* case. 109 S. Ct. 3040 (1989). Of the 75 briefs filed, 10 were by religious groups seeking to restrict women's access to abortion, 2 were by religious groups supporting women's right to choose, and 9 were by traditional civil liberties groups also defending women's right to choose. The other 54 briefs were filed by medical groups, non-affilated "right-to-life" organizations, elected officials, and other interested parties. Proceedings and Orders, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (No. 88-605). For an interesting individualist analysis of the abortion controversy from within the Catholic Church, see J. Hurst, The History of Abortion in the Catholic Church (Catholics for a Free Choice 1989); R, Kohn, The Church in a Democracy 10-14 (Catholics for a Free Choice 1981).

[26] Numerous religious organizations have taken positions on the morality of the homosexual lifestyle. See, e.g., Steinfels, Episcopalians Remain Split on Sexual Issues, N.Y. Times, July 11, 1988, at A13, col. 1; Steinfels, Southern Baptists Comdemn Homosexuality as 'Depraved,' N.Y. Times, June 17, 1988, at B6, col. 2; Steinfels, Methodists Vote to Retain Policy Condemning Homosexual Behavior, N.Y. Times, May 3, 1988, at A22, col. 1. Though it has generally avoided the issue, the Supreme Court has explicitly declined to grant individuals a fundamental right to engage in homosexual activity, thereby leaving the legality of such activity up to each state. See Bowers v. Hardwick, 478 U.S. 186 (1986); see also Woodward v. United States, 58 U.S.L.W. 3545 (1990) (denying certiorari to case involving a nonpracticing homosexual who challenged the constitutionality of his dismissal from the Navy); Ben-Shalom v. United States, 58 U.S.L.W. 3545 (1990) (denying certiorari to case involving a homosexual who challenged army regulations barring homosexuals from service); Rowland v. Mad River Local School District, 470 U.S. 1009 (1985) (denying certiorari, over the dissents of Justices Brennan and Marshall, to case involving a bisexual teacher who was fired solely for her private sexual preference). But see Webster v. Doe, 486 U.S. 592 (1988) (remanding case involving dismissal of a homosexual CIA agent for consideration of the constitutional issues raised).

degree to which a society is tolerant. If a deep sense of tolerance permeates legislative halls, judicial chambers, and private institutions that mediate relations between the state and the individual, legislative outcomes as well as judicial constructions of the Constitution will more likely have the effect of preserving and promoting differences. Because a society's sense of tolerance will be stronger if it is not crisscrossed with exceptions, and because both community and individual differences flourish best when the state is tolerant, there is an important inter-dependence between the strength of the free exercise right and the right of the privacy, one that is seldom recognized.

So what does this have to do with the exchange between Justice Black and Erwin Griswold that I described at the beginning of my comments? Griswold told Black that "no law" should not mean "no law" but "some law." But if "no law" means "some law," as it surely does in our constitutional jurisprudence, what is the scope of the state's power to regulate religious communities under the free exercise clause or an individual's privacy under the due process clause? There is no precise answer to this question. The meaning of these clauses, as with other aspects of the Constitution, is subject to debate and evolution. But what is unmistakedly true is that intolerance threatens all differences, religious ones as well as all others. The wider and stronger the commitment to respecting individual differences, the greater the possibility that over the long run courts will generously interpret the Constitution, including free exercise and privacy rights. In my view, this will only strengthen and enrich a pluralist state such as ours.