Seeking Peaceful Solutions When Accommodating You Doesn't Accommodate Me

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Cases of religious accommodation have been making headlines as people of faith find themselves in conflict with the legally recognized rights of others. In the past, such cases primarily involved issues of faith versus secular interests, for example, government regulations involving land use and zoning, holy day observance, or religious garb. In those cases, the government or business might be very sympathetic to the person of faith, but would argue that accommodation would present an undue hardship or violate health and safety standards.

In recent years, however, the recognition of LGBT rights and contraceptive mandates under the Affordable Care Act have resulted in situations in which people of faith are asked to yield their religious beliefs in order to accommodate what they would argue are secular interests.

While one anticipates that the majority of the individuals involved in these conflicts will resolve their differences peacefully, there are a number of cases that have garnered considerable attention, and in which all sides are entrenched firmly in the conflict.

In Oregon, the owners of the “Sweet Cakes Bakery” were fined $135,000 for circumstances involving their refusal, on religious grounds, to provide a cake for a same-sex wedding. In Kentucky, a T-shirt printer, “Hands On Originals” was fined originally for refusing to print shirts for a 2012 gay pride festival.

There also is the case of “Hobby Lobby,” in which a “closely held private corporation” with tens of thousands of employees denies its employees what would otherwise be their right, under Federal law, to insurance coverage for contraception. Unlike small businesses that face state-level human rights regulations, “Hobby Lobby,” now deemed to have its own corporate right to free exercise of religion, benefits from the Federal Religious Freedom Restoration Act (RFRA: 1993) which applies solely to Federal law as interpreted in *Boerne v. Flores*, 521 U.S. 507 (1997), and *Gonzalez v. O Centro Espirita Beneficente Unaio do Vegetal* , 546 U.S. 418 (2006). Small businesses in states without RFRAs are still subject to the limitations of *Employment Division v. Smith*, 505 U.S. 577 (1990), which found that the free exercise clause of the First Amendment does not allow a person to use religion as a reason not to follow a religiously “neutral law of general applicability.”

A Legislative Fix?

Twenty-six years later, the impact of *Smith* on religious accommodation claims continues to reverberate. Justice Antonio Scalia, writing for the majority, invited states to pass their own laws to vet religious exemptions, because, as Justice Scalia wrote on behalf of the Court, people who claim constitutional exemptions from neutral laws, even if they are affected adversely, could become “a system in which each

conscience is a law unto itself." The Free Exercise Clause to argue against state regulations that affect religion adversely is "a luxury" that "we cannot afford."

Originally conceived to cover members of religious minorities, such as those who use peyote as part of their religious practices, RFRA now has a much more mainstream application and attempts to pass RFRA laws following *Obergefell* have been attacked as attempts to protect bigotry toward the LGBT community legislatively, and are increasingly difficult to enact. In 2014, in response to the "Elane Photography" case in neighboring New Mexico in which Jonathan and Elaine Huguenin had refused to photograph a same-sex commitment ceremony, the Arizona legislature passed SB 1062, which would have allowed business owners to cite a religious belief in order to deny services to gay and lesbian customers. After a significant number of other businesses and LGBT rights advocates protested, including Delta Air Lines, the Superbowl host committee, and Major League Baseball, among others, Governor Jan Brewer vetoed the legislation, providing a cautionary tale to other legislatures that would consider state-level RFRAs.

Is Compromise the Price of Citizenship?

In New Mexico, the state Human Rights Commission found that a wedding photographer violated the state's public accommodations law when she refused, on religious grounds, to photograph a same-sex commitment ceremony. The couple who owned the business appealed to the Supreme Court on the grounds of free speech rather than free exercise, and the Court denied certiorari in 2014.

Judge Richard Bosson of the New Mexico Supreme Court in his concurring opinion in *Elane Photography v. Willock* (2013) specified the binary answer to the question, "Who should prevail when civil rights and free exercise intersect?"

> On a larger se provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice. At its heart, this case teaches that at some point in our lives, all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. The Huguenins are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life. In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.

These types of cases will likely continue to increase over the next few years and churches themselves could become the subjects of lawsuits if, for example, they are able to defeat state-level Blaine Amendments, and obtain government funding for religious school projects. This is being attempted in *Trinity Lutheran Church v. Pauley*, which likely will be argued before the U.S. Supreme Court before the end of the year. If the Court finds in favor of Trinity Lutheran Church and the state of Missouri is

required to provide funding for a recycled playground, it is likely that the next step in similar cases would be to address the rights against religious discrimination.

Cases Where Accommodation May Be Difficult

At the far end of the spectrum, perhaps beyond reasonable accommodation, is the matter of the *Little Sisters of the Poor Home for the Aged v. Burwell*, set for argument before the Supreme Court on March 26, 2016. The nonprofit religious employer is invoking RFRA on its behalf to make an argument that even the opt-out provision from the contraceptive mandate itself, which requires self-certification, burdens their religion "substantially."

There also is the case of a government official, Kentucky's Rowan County Clerk, Kim Davis, who refused to recognize the constitutional rights of same-sex couples under *Obergefell*, such that, for a time, her office provided no such accommodation. Instead, Davis and her attorneys argued that sending same-sex couples who are seeking wedding certificates to other counties that will provide the certificates was a reasonable accommodation.

Careful Application of Alternative Dispute Resolution (ADR) Principles Could Facilitate Long-Term Peaceful Resolution

Under the current rules of engagement, when moral absolutes conflict with protected rights, the sides prepare for battle, and too often, one side goes to court and the other to the legislature, both seeking political advantage. These battles result in successive chains of clear winners and losers whose fortunes can be reversed easily in ensuing rounds.

With respect to conflicts of sexual orientation versus religion, or reproductive rights versus institutional rights, those involved see their positions as a defense of their own identities. Without an amicable resolution, a fight can ensue. If it is resolved legally, by necessity, one right will be ranked above the other, and one side will be forced to do something they believe is wrong, or the other will be forced to forfeit a civil right.

While there always will be those who will take the spotlight as they argue competing claims of morality, they are a distinct minority, and most simply want to get things done, make some money, or order a cake without surrendering their constitutional rights or violating their religious beliefs. There are rights that can be asserted and, legally and socially, acquiescence is unacceptable, but achieving one's rights should not necessitate a call to arms.

Instead, what I would propose is the idea that ADR could be applied before specific disputes arise to encourage and facilitate cooperative dialogue between representatives of major competing interest groups. By appreciating the sincerity of different viewpoints, while at the same time recognizing that many are mutually exclusive, a summit of respected representatives from competing interest and advocacy groups working in the spirit of goodwill could develop a matrix of practical possibilities for accommodation and compromise points.

Practical steps in ADR would include taking an inventory of differences, identifying ideas on which neither side will compromise, assessing practical concerns, developing provisional agreements, and testing them with potential scenarios. Ultimately, the representatives of the interest groups might be able to achieve agreements in advance, with respect to how they will approach these issues should they arise in the future.

Such a framework might not necessarily work for the "all or nothing" ideological poles of the debates. There will always be people on both sides who want to make their point at any cost, and these groups likely will exclude themselves from any pre-emptive negotiation processes. For example, in the Affordable Care Act cases, a corporation's or institution's demand for accommodation in the name of free exercise of religion, without willingness even to listen to other options, could result in a classic Establishment Clause violation. In such cases, those who are exempted from the laws foist the costs upon taxpayers who practice other religions or none at all. (See RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion—Frederick Mark Gedicks and Rebecca G. Van Tassell, June 19, 2014, 49 Harvard Civil Rights-Civil Liberties Law Review (CR-CL) 343 (2014).)

Parenthetically, given this forum, I also recognize Bertschi and Chapman's contrary argument in their recent *Brief of Constitutional Law Scholars as Amici Curiae in Support of Hobby Lobby and Conestoga, et al.* Therefore, I will set the Establishment Clause argument aside at this point, with a brief mention simply to highlight, and defer to, Justice Ginsberg's opinion that there exists "room for play in the joints between the Free Exercise and Establishment Clauses," *Cutter*, 544 U.S. at 709, 713.

One thing is clear, that the tension between the Establishment Clause and the Free Exercise Clause is fluid, and that a uniform approach most likely does not exist. However, I am not proposing that the purpose of the ADR approach is a constitutional argument. Instead, the purpose is to find a way to resolve the issue peacefully and pragmatically.

This concept is not for Kim Davis or the Little Sisters of the Poor. Instead, this is a "play in the joints" approach that sets aside politicians, courts, and legislatures—and their imperfect and protracted solutions—and addresses the mainstream, ordinary disputes that arise when a person who asserts a constitutional right walks into a bakery and orders a cake from an owner who asserts a religious right.

In a speech at the second annual Sacramento Court/Clergy Conference at Congregation B'nai Israel in Sacramento in October 2015, Elder Dallin Oaks of the Church of Latter Day Saints described this approach well when he said:

> My thesis is that we all want to live together in happiness, harmony, and peace. To achieve that common goal, and for all contending parties to achieve their most important personal goals, we must learn and practice mutual respect for others whose beliefs, values, and behaviors differ from our own. As Justice Oliver Wendell Holmes observed, the Constitution "is made for people of fundamentally differing views." Differences on precious fundamentals are with us forever. We must not let them disable our democracy or cripple our society. This does not anticipate that we will deny or abandon our differences, but that we will learn to live with those laws, institutions, and persons who do not share them. We may have cultural differences, but we should not have "culture wars."

Yet, as W. Barnett Pearce and Stephen W. Littlejohn pointed out in their book *Moral Conflict*, "[W]hen these social worlds collide, whether in casual conversation or political activity, each finds that the other constitutes a repudiation of that which it holds most dear. This finding is not merely epistemic, but also moral. That which each side holds most sacred compels it to oppose the other, and to the extent that the other resists and justifies that resistance within its own moral vocabulary, each is compelled to redouble its efforts to obstruct, eliminate, and disempower the other. The results are familiar patterns of reciprocated diatribe, in which each side rudely tells the other what is wrong with it. Useful discussion of the ostensible issues becomes a casualty of the bickering" (Littlejohn 1997).

Using ADR to Preempt Disputes

As Deborah Kolb noted, the ADR is "a worldwide confederation of people united by their belief that it is both possible and necessary to 'bring a different kind of process to the problems of overcrowded and unsympathetic courts; to changing, conflict-ridden communities; and to the stalemates that accompany long and contentious struggles over public policy and international affairs'" (Kolb 1994).

We should evaluate each circumstance on its own merits, when the parties are not on a fact-finding mission to win later litigation. This is why a pre-emptive ADR process is preferable.

1. Seek to understand motivations, and encourage facilitated dialogue between sides so that each can present his/her viewpoint fully without being judged. Each side can present an ideological perspective during this step, but to succeed, they should do so with the goal of increasing understanding, rather than simply "beating" the other side. Further, each side can discuss religious beliefs, history, how it previously resolved such disputes, etc.

2. Develop a list of practical, not ideological, issues that must be addressed cooperatively. Determine a typical timeline for addressing those issues. For example, in a wedding cake case, how early a cake is ordered, etc.

3. Determine to what issues both sides may stipulate and exclude them from the dispute.

4. Determine contended areas, and focus them so that they are as specific as possible.

5. Propose *specific* practical alternatives to the issues. Both sides should perceive that they are working cooperatively to try to find a way to resolve the issues.

7. Isolate irreconcilable issues that cannot be resolved.

8. Work to resolve those issues, or develop alternative accommodations.

9. Develop narrowly tailored accommodations.

By recognizing the sincerity of opposing positions on the issues and deriving specific areas of accommodation, the conversation moves from ideology and conflict to one of mutual and practical problem-solving.

To bring the parties together to implement these strategies, I propose the following steps.

1. Hold “summits” between major advocacy groups on all sides to promote this approach by demonstrating costs/risks of litigation and legislation and the unpredictability of the political process.

2. Obtain consensus to participate in a multicultural problem-solving exercise.

3. As an exercise, hold meetings to address hypothetical scenarios and develop mutual solutions. Standing bilateral committees also could be convened to address these issues.

4. When an actual conflict emerges, key negotiators should meet with the parties to develop a practical framework of the issue and identify the areas of concern, and then meet and confer to attempt to find a resolution. If no mutual solution is reached early on, then offer mediation with the participation of the parties and key negotiators for each side. The goal is not to win, but to resolve the problem and move forward as quickly and painlessly as possible using the previous cooperative frameworks as a point of reference.

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