Why We Need State RFRA Bills: A Panel Discussion

Alan Reinach[*]

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INTRODUCTION

The most pressing issue facing proponents of Religious Freedom Restoration Acts ("RFRAs") when confronting legislators is their importance and necessity. Legislators want to know the problems RFRAs are designed to remedy; they want to know of particular horror stories they can claim to fix. However, one practical problem for advocates is that neither legislators nor the general public are overly sympathetic to the worst violations of religious liberty, which tend to involve either minority faiths or religious practices

[*] President of the Seventh-day Adventist Church State Council, the religious liberty educational and advocacy arm of the church for a five-state western region, including California, Arizona, Nevada, Utah, and Hawaii. Mr. Reinach chaired the drafting committee of the California Coalition for the Free Exercise of Religion, sponsors of AB 1617, The Religious Freedom Protection Act; and has also been active in forming state RFRA coalitions in Arizona and Hawaii, and in advocacy efforts in Nevada.

that are feared, hated, or both.

For instance, just before scheduled hearings in the Arizona Senate Judiciary Committee, the Arizona Republic ran a column concerning an inmate's fifteen year battle to obtain kosher meals.[1] The article derided the inmate's religious freedom claim, and doubted that it was "kosher" for a rapist to demand kosher food. It did not matter that the Arizona prisons routinely serve kosher food to those who require it. No one asked why the prison establishment was willing to fight for fifteen years to deny this prisoner kosher meals when it provides them routinely to others. The damage was done. When it comes to a convicted rapist, the media knows no possibility of redemption or forgiveness.

Conscious of this rapist story, while preparing to testify before the Arizona Senate Judiciary Committee, I tried to find the most appealing free exercise example to cite. I decided to showcase the problem that many Seventh-day Adventist public school students encounter when they try to enroll in a band class. They are typically told that if they cannot participate in concerts on Friday nights for religious reasons, they might as well not enroll, for they will receive a failing grade. I argued that schools should be more accommodating, permit religious students to participate in band, and excuse them from the occasional concert that might conflict with religious obligations. Surely the Senators would be solicitous of our youth, and realize the need to avoid creating a situation in public schools that would make some students feel like second class citizens because of their faith. Alas, this example failed to heighten interest and the Arizona RFRA bill met with stiff opposition.[2]

Another basic problem that advocates confront is that many legislators are surprisingly ignorant concerning religious freedom. They have never heard of *Employment Division v. Smith*[3] or *City of Boerne v. Flores*.[4] They labor under the common misperception that the law protecting religious freedom works well and does not require legislative action. Legislators also labor under the misconception that state supreme courts are more willing to interpret

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[1] *See* David Leibowitz, *Is Catering to a Rapist Kosher?* ARIZ. REPUBLIC, Feb 3, 1999, at B1.

[2] The opposition was led by a Senator from Tucson, Arizona, who asserted that if any such problems arise in her district, she sees that they are worked out. A Jewish mother testified about the ongoing problem of schools scheduling field trips and other activities on the High Holy Days. This was met with the same response. Ironically, the Senator leading the opposition to the bill was herself, Jewish.

[3] 494 U.S. 872 (1990).

[4] 521 U.S. 507 (1997).

state constitutional provisions in a manner that provides greater religious freedom than similar provisions in the U.S. Constitution, as the Supreme Court has so interpreted.

Again, the Arizona Senate hearings offer a fitting example. The RFRA bill fell into a constitutional catch twenty-two as Senators asserted inherently contradictory reasons for objecting to the bill. Senators argued both that the Arizona Constitution already protected against facially neutral laws of general applicability, and that a state RFRA might open the door to a litigation explosion should they adopt the bill. Ultimately, the fact that there had been only six reported RFRA decisions in Arizona in five years fell on deaf ears, as the bill was voted down in committee. Assumptions about the adequacy of the Arizona Constitution were contradicted by legal analysis supplied to the committee, but to no avail.

Since legislators may have many and varied reasons for ambivalence and opposition to RFRA bills, advocates must be prepared to effectively address why we need such bills. Answers to this question fall into two general categories: those that deal with legal explanations — the erosion of constitutional protection for free exercise rights; and those that document actual cases or problems. Part I of this Article will address the legal erosion of free exercise rights. Part II of this Article is a refined version of a panel discussing why state RFRAs are needed. Panelists represent two unique faith perspectives, Jewish and Seventh-day Adventist; the views of two leading activist organizations, Justice Fellowship and the Council on Religious Freedom, and; one prominent law professor/activist, Doug Laycock. The intent of the panel was to compile the sort of practical experiences that legislators crave in order to justify legislation. Of course, this task is an ongoing one, as those advocating for state RFRAs continue to network, to exchange horror stories, and to refine advocacy techniques.

I. A GOOD METAPHOR IS WORTH A THOUSAND PICTURES

If a picture is worth a thousand words, a good metaphor is worth a thousand pictures. Other legal commentators have analyzed the relevant Supreme Court decisions. I would prefer to assume a basic familiarity with *Smith* and *Boerne*, and propose some metaphors that not only capture the reality of these decisions, but may have some utility for advocacy purposes.

A. The Property Rights Metaphor — No Balance

The Seventh-day Adventist Church is involved in litigation with Solano County, California, over the issue of whether a local congregation can locate radio broadcast facilities in office space on church premises.[5] The County Board of Supervisors denied the church a conditional use permit for the radio station, which required only office facilities, since actual broadcast would be from an existing tower on a nearby mountain.[6] At oral argument of the appeal, the assistant county attorney made a shocking statement: "no property owner has any right to the use of his land, unless that use is permitted by government."[7] While I am no expert on property rights, I doubt that this statement is literally true. But more to the point, I suspect that most Americans still have enough residual commitment to individual liberty that they would recoil with horror at the suggestion that they were entirely dependent on government to tell them what they can or cannot do with their land.

Yet, when it comes to the free exercise of religion, that is precisely the status of the law. We are entirely dependent on government in cases where religious exercise is in conflict with a facially neutral law of general applicability.[8] Religious exercise is utterly bound by whatever government determines in such cases. There is no necessity of compromise or balance.

Anyone even remotely familiar with the land use process understands that the process seeks to achieve a balance between the rights of the landowner to the use of her land, and the rights of the community to avoid the unwanted impact a particular use may cause. The process relies heavily on compromise to achieve that balance. Yet, when it comes to similar conflicts between the general goals of society as expressed in facially neutral laws of general applicability, and unique religious beliefs and practices, no such process of compromise or balance is now required.[9] Government wins and religion loses.[10] Government power to infringe on free exercise is almost unfettered by meaningful constitutional limita-

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[5] *See* Vacaville Seventh-day Adventist Church v. Solano County Bd. of Supervisors, No. L01955 (Cal. Super. Ct. April 14, 1998).

[6] *See id.*

[7] *Id.*

[8] *See Smith*, 494 U.S. at 872.

[9] *See id.*

[10] Litigators will assert legal theories, such as hybrid rights, or a scheme of individualized exemptions, to avoid the harshness of this rule. Nevertheless, the observation above accurately describes the general rule.

tion. Contrast the current Supreme Court's disdain for religious freedom with the sentiments of George Washington, our nation's first president, as expressed in a letter of reassurance to Quakers. Washington's statement captures the essence of the strict scrutiny concept:

> I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.[11]

Washington would jealously protect free exercise as one of the "conscientious scruples of all men," as balanced against compelling community interests, or the "essential interests of the nation," in Washington's own words. His expression is consistent with the strict scrutiny standard advocated by state RFRA supporters. He would require a balancing that puts an appropriately heavy burden on government to justify an infringement upon religious freedom. Current law requires no such balancing.

B. The Road Runner Metaphor

If you've seen it once, you've seen it a thousand times. Wile E. Coyote is chasing the Road Runner. The Road Runner steps aside, just before going over the cliff. The Coyote, meanwhile, keeps going. As long as Wile E. Coyote keeps looking ahead, he zooms forward, oblivious to the fact that he is no longer on solid ground, but in thin air. As soon as he looks down – well, you know what happens.

This aptly illustrates the state of free exercise law. The constitutional foundation has crumbled, leaving free exercise hanging in thin air, waiting to crash. Although the foundation has crumbled, we have not yet experienced a flood of free exercise cases. In comparison with, for example, sexual harassment or employment discrimination claims, or some other civil rights problem, free ex-

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[11] A DOCUMENTARY HISTORY OF RELIGION IN AMERICA 278 (Edwin Gaustad ed., 2d ed. 1993).

ercise cases are statistically insignificant.[12] We have not yet crashed.

Perhaps the reason we have yet to crash is that America has a long tradition of respect for religious freedom. To some extent, we are living on borrowed cultural and constitutional capital. Since the constitutional foundation has already been destroyed, how long can religious freedom endure?

C. Free Exercise as a Cripple

A recent Ninth Circuit decision has invigorated discussion of the theory of "hybrid rights" as a basis for protecting free exercise.[13] The theory arises from Justice Antonin Scalia's characterization, in *Smith*, that the vast body of religious free exercise cases that appeared to adopt strict scrutiny were really hybrid cases, involving both free exercise plus another constitutional right.[14] The theory is that free exercise claims recover their constitutional strength only if accompanied by another, hybrid, right. The Ninth Circuit engaged in a lengthy discussion of hybrid rights, and considered just how strong a hybrid claim must be to trigger the protection of the strict scrutiny test.[15] No doubt, at some point the Supreme Court will consider this issue and determine whether the hybrid-rights theory is valid or not, and if so, how to apply it.

Until then, we are left with the distinct impression that free exercise has become a paraplegic, a cripple, who must be wheeled into court by a hybrid right. Free exercise claims have no legal leg to stand on, unless a hybrid right serves as the wheelchair, thus giving them a legal basis.

Some may hope that the hybrid-rights theory will adequately blunt the worst edges of the *Smith* decision. This is unlikely. Instead, the hybrid-rights theory illuminates the absurd state of the law: that religious exercise warrants the protection of strict scrutiny only when it can stand on the basis of some other right. The hy-

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[12] To determine whether a state RFRA bill was needed, I searched all reported free exercise cases in California, Arizona, and Hawaii. In California, for example, I found eight reported free exercise cases, not counting RFRA cases. Additionally, I found more than 10 cases, including RFRA cases, in Arizona and Hawaii.

[13] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999). This case applied the hybrid-rights theory to sustain the right of Christian landlords to refuse, on religious grounds, to rent to unmarried couples, notwithstanding a statute forbidding discrimination on the basis of marital status.

[14] *See Smith*, 494 U.S. at 881.

[15] *See Thomas*, 165 F.3d at 702-09.

brid-rights theory demonstrates that free exercise has become a cripple.

D. Gimme Shelter!

Songwriters and poets have waxed eloquent about home. They sing and write about a sense of belonging, a sense of communal intimacy, seeking protection from the storms of life. Home is a particularly potent symbol for what religious freedom is now lacking in America. One of the foremost religious freedom litigators of our generation, Lee Boothby, commenting on *Boerne*, put it this way: "As a result, many religious people are like the homeless — without shelter."[16] Indeed, it is not only religious people, but the right of religious freedom itself, that is without shelter. Writing in dissent in *Smith*, Justice Blackmun declared: "This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.'"[17]

Historically, religious freedom is a home-grown American product. We were the first country on earth to adopt the principle that everyone is truly equal in the eyes of the law, regardless of their faith. We were the first country to fully protect religious freedom as a matter, not of discretion, but of constitutional right. Religious freedom is the single most significant contribution our nation has made to the world.

Yet, religious freedom has now become a "luxury." It is a stranger in its own home. Unlike the prodigal son in the parable, who left home of his own free will, religious freedom has been cast out of the house.[18]

E. A Beggar

The plight of the beggar is another fitting metaphor for those seeking protection for religious free expression. Not only has religious freedom been quite literally cast out of its home, denied

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[16] *Without Shelter: Life in Post- RFRA America*, LIBERTY, Nov./Dec. 1998, at 89.

[17] *Smith*, 494 U.S. at 908-09 (Blackmun, J. dissenting) (citations omitted).

[18] *See Luke* 15:11-32.

legal shelter, and treated as a stranger, and a cripple, but religious freedom has also become a beggar. Said the majority in *Smith*:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all law against the centrality of all religious beliefs.[19]

Many arguments could be brought to bear to refute this contention. Most obvious is the language of the First Amendment itself: "Congress shall make no law . . . . ."[20] By its terms, the very purpose of the Amendment was to remove the rights protected therein from the sphere of legislative activity.

In the midst of World War II, when America was battling for the life and soul of the free world, the Supreme Court declared that freedom was more important than patriotism, ruling that Jehovah's Witnesses students with religious objections to saluting the flag could not be required to violate their faith.[21] That courageous Court recognized what the current Court has forgotten:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[22]

Religious freedom has become a beggar, because it must now beg for protection at the mercy of legislatures. Contrary to the implied contention of the Supreme Court, religious freedom values rarely, if ever, really do command the majority. It is not just that minority

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[19] *Smith*, 494 U.S. at 890.
[20] U.S. CONST. amend. I.
[21] *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
[22] *Id.*

religious practices are at the mercy of the legislature. Instead, all religious practices that are taken seriously enough to require some from of exemption or accommodation are likely to be minority practices. Hence, the image of a beggar seeking alms is all too apt.

F. The California Experience

Today's Court has forgotten the meaning of America. It has forgotten that our love of freedom means that fundamental freedoms are constitutionally secured from the tyranny of the majority. Today, religious freedom has been reduced to the status of a beggar. No longer constitutionally protected, it must go, hat in hand, asking the majoritarian legislative bodies to provide some form of relief. This is what RFRA is all about: welfare for a once proud and noble constitutional right that has been reduced in circumstances, lost its estate, and is now out on the street.

Our experience in advocating a RFRA bill in California demonstrates just how difficult it is to protect a fundamental right by statute. The majoritarian body, the legislature, is a place of compromise. Various interests are balanced against each other in an effort to soften the harshest impact a given bill may have for some interest. This is proper.

When religious freedom advocates went to the California legislature in 1998, seeking statutory protection, they encountered a wide variety of opposition. The most serious issue was the perceived conflict between religious freedom and other civil rights. Other interests were asserted on behalf of prisons, land use, the environment, and child welfare. The legislature responded with specific amendments to clarify that religious freedom would not undermine other specified commitments. With great difficulty, the California bill endured the legislative process, faithful to its initial objective of reestablishing religious freedom as a fundamental right.[23]

In retrospect, many who supported the RFRA bill, AB 1617,[24] now admit that the final draft that cleared the legislature was overly

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[23] AB 1617, The Religious Freedom Protection Act, introduced by Joe Baca (D-San Bernadino), passed both the Assembly and the Senate but was vetoed by Governor Pete Wilson.

[24] AB 1617 was supported by the California Coalition for Free Exercise, uniting a wide range of Christian, Jewish, Muslim, Sikh, and other faith groups, as well as civil rights groups like the American Civil Liberties Union.

complex and poorly drafted.[25] The political process burdened the fundamental right of free exercise with numerous explanations and qualifications, although outright exemptions were avoided. Thus, there is a good reason why fundamental rights should be constitutionally protected, rather than subjected to the political process and its compromising tendencies.

That is a moot point, for now. Whether we like it or not, religious freedom must seek protection from a legislature that may be ambivalent, or even hostile. The advocate's task is to adequately justify the need for legislation. What follows are the remarks of various advocates of state RFRA bills on this precise issue. It has now been almost a decade since the Supreme Court's decision in *Smith*. During that decade, five years have gone by without the protection of RFRA. For most casual observers, it does not look like much has changed. In other words, the post-*Smith* era to the casual observer looks very similar to the pre-*Smith* era. The question, then, that the panelists addressed is the practical significance of *Smith* and that of the protection RFRAs provide.

II. PANEL DISCUSSION

A. Pat Nolan[26]

With all deference to the litigators here, I think the greatest significance that the Federal RFRA held was in bargaining. It gave a person a seat at the table with any government official whose conduct impeded one's ability to practice their faith. It gave us a chance to ask the official: "what is it you are actually trying to protect?" Then it allowed us to engage in a dialog as to whether there was a way to protect that interest in such a way as to minimize the infringement on our ability to practice a religion. The numbers of those situations that occurred while RFRA was law are legend. It happened many times a day.

With the *Smith* standard, the bureaucrat wins and says "take us to court." Most people who have had their faith infringed upon do

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[25] Coalition members would be reticent to publicly declare that AB 1617 was flawed, having invested so much energy in passing it. Despite its flaws, the Coalition still hoped that it would achieve its goal. Nevertheless, some Coalition members acknowledged that fundamental principles had been battered and bruised by the legislative process, and that amendments taken out of political necessity posed a risk to the bill's integrity.

[26] President of the Justice Fellowship and former member of the California State Assembly for 15 years. For four of those years, Mr. Nolan served as the Assembly Republican leader.

not have the resources to file a legal claim in court. So a state RFRA will once again permit the individual to at least engage in a dialog: "Is there a way to protect your interest, Mr. Bureaucrat, while not abridging my ability to practice my faith?"

I want to address the issue of the RFRAs applying to prisons. The public has little sympathy for the religious freedom rights of prisoners. However, prisoners have absolutely no ability to practice their faith except at the sufferance of officials. Everything they do requires the permission of those that are in charge of the facilities. Not only does this mean they need permission to attend a religious service or Bible study, but their ability even to possess a Bible or any religious literature in their cells is left to the discretion of the administration. This is a political issue that must be confronted in every single state where there is an effort to pass a RFRA.

First, Professor O'Neil pointed out that we already have a track record. RFRA's legal standards were in place for many years and there was no parade of horribles. No court in the country required a prison official to allow any practice that endangered the safety of any prison personnel or of the inmates. Those seeking prison exemptions try to find examples where prisoners with access to law libraries bring esoteric claims. The prisoner who claims to belong to the Church of Filet Mignon, in which it is a religious sacrament to have steak every night, and where the denial of steak every night is a denial of religious liberty, makes a great story. Then there is the prisoner who claims that the Bible requires him to be fruitful and multiply, and that he must have conjugal visits from his wife. These make great stories in the legislature and the legislators all chuckle and say, "Yeah those darn prisoners are filing these lawsuits." The reality is that none of those lawsuits have gotten anywhere. No court has ever ordered a prison official to give conjugal visits in order to respect a prisoner's religious freedom, nor has a court recognized the Church of Filet Mignon or compelled officials to serve its adherents steak.

The reality is that, during RFRA's existence, Jewish prisoners used the law to obtain permission to wear yarmulkes in prison when a warden said it was evidence of gang attire. RFRA was used to allow a Catholic to wear a crucifix when the prison official argued that it was a weapon. In that case, prison officials provided inmates with four inch long plastic toothbrushes, but claimed that a one inch long plastic crucifix was more dangerous.

RFRA was very useful as a tool when prison officials canceled

evening bible study. We could ask whether there was a way to accommodate the Bible study while still protecting the officers and inmates involved. The fact is we have a track record of years where allegedly frivolous prisoner claims were neither numerous, successful, nor burdensome.

Those advocating prison exemptions also claim there will be a flood of lawsuits, or that there have been a flood of lawsuits. We have gathered the statistics on the number of lawsuits filed under RFRA, and the numbers are unspectacular.[27] For example, in Virginia, there have been seven cases.[28] Mark Early, the Virginia Attorney General, said it is difficult to argue that these seven prisoner RFRA lawsuits constitute a great burden on the state of Virginia.[29] But our opponents consistently make that argument. Presenting the statistics can destroy their arguments.

I would like to emphasize, though, that as we have dealt with the effort to pass state RFRAs, what is most lacking is that those with the most at stake — those who belong to religious congregations — have no sense of urgency. They do not feel that their religious liberty is threatened. That is the biggest hurdle we have. If they did, they would rise up and the legislators would respond.

Instead, legislators are faced with Deputy Attorneys General claiming to be overwhelmed by an increasing caseload. Zoning officials warn of the repercussions, maintaining that RFRA soon will require permitting the building of slaughter houses next to residential facilities. The historic preservationists argue that RFRA will neutralize legal protections that exist for historic buildings. Professor Douglas Laycock has said that every interest group in society comes forward to protect their interests, which stand in opposition to the goals of RFRA. Legislators tend to respond in their favor, given the absence of vocal support from religion. It is important we get the word to the members of our congregations. We need to present compelling examples that will convince not only legislators, but the very people who need RFRA's protection the most. Until we do, it will be very difficult to pass State RFRA bills.

Everett Dirkson once described the legislator's mentality by saying: "When I feel the heat, I see the light." Right now there is no heat. Instead, we have relied on the good will and understanding

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[27] Justice Fellowship maintains records of RFRA decisions on a state-by-state basis.

[28] *See* Letter from Virginia Attorney General (May 11, 1998) (on file with author).

[29] *Id.*

of legislators. We have been able to pass some bills on this basis. But if we are to build on these early successes, we will have garner significant support from our own constituents, and through them, their legislators.

B. Nick Miller[30]

I would like to share a compelling story. I spoke on the telephone last week with a Baptist minister in Southern California, Wiley Drake. This story puts a human face on the land use and zoning issues that Professor Laycock is going to address. I think it also shows that it is not just about money and economics or whether to build in one place or another — these issues can affect the heart of the religious mission of an organization.

Pastor Wiley Drake is a pastor of a small Southern Baptist Church in the City of Buena Park, which is right next door to Anaheim and Disneyland in Southern California. His congregation helps those less needy in his neighborhood. They have a rehabilitation program for the homeless on the streets of Buena Park, processing nearly two thousand homeless individuals a year. The congregation has three goals — two of them mandatory, one of them encouraged — for the homeless individuals it helps. First, those who are using or abusing alcohol or other drugs must get into a substance abuse program and become dry. Second, they need to enter a rehabilitation program to get back into the workforce. Finally, the congregation encourages the homeless to attend their Bible studies and prayer meetings, and to grow spiritually.

The city fathers of Buena Park took a different view of this ministry than did Pastor Drake's church. They called Pastor Drake into City Hall and met with him to discuss the impact of his ministry on their community. The mayor, the city manager, and the chief of police attended the meeting. They informed him that the city was an entertainment corridor. His church's activities with the homeless were having a negative impact on the city's image.

Pastor Drake explained to them the effectiveness of the ministry and its importance to the life of the church. It was not something tangential to their beliefs but, rather, ran to the heart of their faith.

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[30] Executive Director, Council on Religious Freedom. Mr. Miller was instrumental in organizing this symposium.

The city fathers were not interested. They warned him to stop the homeless activities or face the consequences. When Pastor Drake and his congregation continued, the city responded by filing eleven criminal charges against the church, the pastor in his individual capacity, and the church treasurer. The case went to trial and seven of the charges were dismissed.[31] I think the treasurer turned state's evidence and the charges against him were ultimately dropped. Four charges against the pastor and the church were sustained and convictions were obtained. These convictions were for violations not related to health, safety or fire hazards, but with use permits. The church had obtained permits for a hall for recreational use, and were now using that same facility for storing food and clothing which was given to the needy. This was regarded as a commercial use and the church's continued insistence on such use was considered a violation of the permit. Pastor Drake was convicted on four counts. At the sentencing hearing the judge said he was eligible for two years of prison time as well as a $2000 fine.

The judge, who must have had some sense of justice and possibly a sense of humor, sentenced the pastor to 1500 hours of community service — time already served.[32] The church was put on probation for three years. The police in Buena Park have permission to enter church property and monitor to assure there are no homeless people that should not be there. If so, the city can shut down the entire program.

The case is currently on appeal. The church's First Amendment claim failed because these were neutral, generally applicable laws which, in the post-RFRA era, are unactionable.[33] Moreover, California courts, like those in many states, do not apply constitutional standards to land use issues. In this case, land use is at the heart of what this Baptist church is all about — to the heart of its mission. The land use issue has a very human face in Pastor Wiley Drake. Clearly, this case would have come out very differently if a California RFRA had been in effect.

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[31] This report is largely based on an interview with Pastor Wiley Drake.

[32] Pastor Drake believes that press attention moderated the judge's previously harsh view of this case. The judge had refused to charge the jury on a religious liberty defense.

[33] The *Smith* standard holds that facially neutral laws of general applicability are not subject to strict scrutiny, and do not give rise to First Amendment free exercise claims. Alternatively, some courts will apply a rational basis test, e.g., *Brunson v. Department of Motor Vehicles*, 72 Cal. App. 4th 1251, 85 Cal. Rptr. 2d 710 (Ct. App. 1999), which amounts to the same result — dismissal of the free exercise claim.

C. Alan Reinach[34]

It is a real privilege to be here with all of you for this historic conference. The question we are dealing with in this panel is perhaps the most crucial if we are to succeed in passing state RFRAs. We have been aggressively pursuing RFRA bills in three states so far, California, Arizona and Hawaii. The question we hear most from legislators is why this bill is needed. They do not want to hear legal jargon. They want to know who is getting hurt and what needs fixing.

I have been asked to provide some concrete examples, from the perspective of my own faith, of the kinds of free exercise problems we experience. Seventh-day Adventists adhere to historic Biblical faith, so we share many religious liberty problems with other Christians. Like other churches, we also have distinctive teachings that lead to unique challenges. First, as an example common to many believers, recently we assisted an Adventist nurse who refused, for religious reasons, to participate in providing abortion services. This case arose in a private hospital setting, thus raising only Title VII religious accommodation issues. However, had it arisen in a public hospital, it would have also raised constitutional concerns.

The largest volume of free exercise problems for Seventh-day Adventists, by a wide margin, arise from observance of the Seventh-day Sabbath, from sundown Friday to sundown Saturday. Adventist students attending public schools are routinely denied opportunity to participate in band and athletic programs, because concerts or games are scheduled on Sabbath. Only occasionally do school districts make any attempt to compromise or accommodate the Adventist students. Most frequently, parents simply accept such exclusion as a cost of their faith. However, those students who are excluded do not universally respond with a sense of pride over maintaining their faithfulness. Such painful experiences lead some students to resent and eventually abandon their faith.

In the school context, RFRA ought to protect the right of students to engage in activities, such as band, where Sabbath activities are only a part of the whole. A student can participate in band throughout the week, and perform in those concerts that are not held during Sabbath hours. The fact that the student will refrain from participating in all concerts should not exclude that student.

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[34] *See supra* note *.

The band has no interest sufficiently compelling to justify excluding the student entirely. After all, the band would not be better off by excluding the student altogether than by permitting the student to partially participate.

Sabbath problems arise most often in the context of employment. Government employers account for a disproportionate share of cases. This may be attributable to the fact that government employers have no economic incentive to negotiate a Sabbath accommodation. Corporations are generally myopically focused on profits and, therefore, have every fiscal incentive to avoid costly litigation. Accountability in government does not operate as it does in the private sector. Rather, government officials are much less concerned about the costs of litigation.[35] The last major Ninth Circuit Title VII case, in 1996, involved a government employer, the California Department of Food and Agriculture. Kwasi Opuku-Boateng had applied for a permanent position with the agency.[36] When he informed the agency he could not work on the Sabbath, the agency terminated the hiring process.[37] The Ninth Circuit found that Opuku-Boateng had established a prima facie case of religious discrimination and that the state had not demonstrated that it would suffer undue hardship if forced to accommodate.[38] An important Title VII case currently pending in the Ninth Circuit also involves a government employer, *Balint v. Carson City*.[39]

Working on the Sabbath, or otherwise violating one's religious faith, should not be a condition of government employment. Indeed, government employers should be held to a higher standard than that standard established by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*.[40] In *Trans World Airlines*, the Court held that requiring an employer to bear more than a de minimus cost in accommodating an employee's religious practices amounted to an undue hardship.[41] The compelling interest test, if applied to government employment, would certainly negate the de

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[35] Even in cases where we have dealt with top management of a government agency, there was no apparent sense of fiscal imperative to negotiate. In fact, government agencies are far less willing to negotiate, generally, than their corporate counterparts, although there are always those fair-minded or sincere officials who prove exceptions to the rule.

[36] *See* Kwasi Opuku Boateng v. California, 95 F.3d 1461, 1466 (9th Cir. 1996).

[37] *See id.*

[38] *See id.* at 1472-73.

[39] 180 F.3d 1047 (9th Cir. 1999).

[40] 432 U.S. 63 (1977).

[41] *See id.* at 85.

minimus rule established in *Hardison*. However, it would not require courts to disregard important governmental interests. The employer must be able to perform its necessary functions. Religious accommodation cannot undermine those functions. However, under current law any de minimus burden on an employer is enough to permit government to abridge religious liberty.[42] This is wholly inadequate when applied to government. A constitutional standard ought to apply, and one that adequately respects religious freedom.

Sabbath testing problems are also prevalent. Most testing agencies are reasonable, and are willing to provide for non-Sabbath testing. But some public schools, colleges, or testing agencies instead force Adventist students to choose between their religion and their educational progress.[43]

Aside from the Sabbath, other aspects of Adventist faith encounter problems absent RFRA. Publishing work has been an important part of the Adventist ministry since our inception as a church. For many years, we have employed a sales force to market literature directly to the public, including in-home presentations. In addition, every year many churches conduct a fund raising drive for community service and disaster relief ministry. In many places this involves door-to-door solicitation. These activities frequently lead to conflicts with local government authorities over licensing or permitting.

A very current concern involves our teaching that church members and institutions abstain from involvement with labor unions. In the small town of Ukiah, California, about two hours north of San Francisco, an Adventist hospital is involved in litigation with the California Nurses Association over their effort to unionize the nurses. The hospital objects to recognizing a labor union on religious freedom grounds. First and foremost, the very act of recognizing a labor union violates the hospital's religious convictions. In addition, such recognition could easily lead to the hospital being forced to negotiate over faith-based policies.

The hospital has raised a jurisdictional defense, arguing to the National Labor Relations Board ("NLRB") that, because of the First Amendment and RFRA, the NLRB lacks jurisdiction to im-

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[42] *See id.*

[43] I am currently preparing to seek an injunction against the State of California because one of its professional graduate programs has scheduled all required coursework on Saturdays.

pose a labor organizing process against the religious scruples of the hospital. Although RFRA has of course been invalidated as to the states, several courts have held that it is still in effect with respect to the Federal government.[44]

Free exercise claims can and do arise because of state labor laws as well. In a pending lawsuit, two former employees are suing Loma Linda University and Medical Center, an Adventist institution, claiming in part that they were discharged in violation of state labor laws for seeking to organize a labor union.[45] If they really were trying to organize a labor union, this would itself have been grounds for discharge, since the Adventist faith prohibits such activity. A state court will have to decide whether Loma Linda has a right to discipline employees for violating church teachings against participating in labor unions. Clearly, Loma Linda is on uncertain constitutional ground without the benefit of RFRA.

The right to discipline employees for violating church teachings often arises in cases of sexual misconduct. Frequently, disgruntled former employees bring discrimination lawsuits, asserting claims based on age, gender, or race, regardless of the faith-based reason for the discharge. Title VII permits religious institutions to discriminate on the basis of religion. However, state law may provide an independent basis for a discrimination suit in such cases. California currently exempts religious nonprofits from its discrimination laws.[46] However, this exemption is under attack, and may well be repealed this year.[47] If so, religious institutions may be required to retain faculty, administrators, ministers, or other employees who uphold neither the doctrinal nor behavioral standards of the church. Obviously, this would devastate the church's ability to carry on its religious mission.

Another pending case involves land use in Vacaville, California, where an Adventist church is seeking to establish a Christian radio station on church property, utilizing a donated mobile home. The Board of Supervisors held that the radio station was not an accessory use to an Adventist Church, since no other church in the county operated a radio station. They also held that a radio station

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[44] The hospital insists that recognizing a labor union would force it to negotiate.

[45] *See* Shankel v. Loma Linda Univ., No. SCV272520 (Cal. Super. Ct. 1994).

[46] *See* CAL. GOV'T CODE § 12926(d)(1) (West Supp. 1999).

[47] The expected language has not yet been introduced. AB 1541, however, contains language repealing the exemption only for religious hospitals that serve the public. As introduced, there is no provision to exempt religious hospitals with respect to the right to discriminate on the basis of religion.

is not a communication facility. This latter ruling was necessitated by the fact that communication facilities are permitted in any zone.[48]

The county's view of this case is that it has the right to restrict the proclamation of the gospel, which is central to the church's very reason for existence, without regard for whether the radio station will adversely impact the community.[49] In fact, the record was silent as to any real impact on the community. Sure, there were the usual assortment of a few neighbors who complained, but their complaints lacked any substance. One neighbor even complained that the station, not yet in existence, was already interfering with his television reception.

On appeal, the church's attorney, Fred Blum, argued that determining whether a radio station is an accessory use by reference to the conduct of most churches is blatant discrimination against minority faiths. The majority's activities determine the scope of minority conduct, Blum concluded.[50] This is the worst sort of majoritarianism which our constitution intended to prevent. This reasoning, according to Blum, would permit the county to say to the Catholic Church: "a confessional is not an accessory use to your church, since no other church in the county has a confessional."[51] Using this reasoning, the county could say to a synagogue: "a mikvah[52] is not an accessory use since no other faith group has one."[53]

California has a public accommodation law, the Unruh Civil Rights Act,[54] that makes no exemption for religious institutions.

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[48] The county interprets this as relating to unmanned facilities only. This would mean that one could locate an unmanned tower in a residential zone, but not an actual radio station, which can fit into one or two rooms of a house.

[49] The premise of this case is that a radio station is not an accessory use to a church. Such determination is independent of whether that use will adversely impact the community. Thus, the county argued findings by the Planning Commission such as: "it is not common or necessary for radio stations to be associated with churches," and "the establishment, maintenance and operation of the radio broadcasting station is a professional office use which is not in conformity with the County General Plan goals, policies and objectives regarding the intended land uses in rural residential areas." Respondent's Opposition to Petition at 11-12, Vacaville Adventist Church v. Solano County Bd. of Supervisors (Cal. Super. Ct. 1998) (No. L010935).

[50] *See* Petitioner's Memorandum at 9-10, *Vacaville Seventh-day Adventist Church* (No. L010935).

[51] *Id.*

[52] A Mikvah is a bath used for ceremonial cleansing.

[53] Petitioner's Memorandum at 9-10, *Vacaville Seventh-day Adventist Church* (No. L010935).

[54] *See* CAL. CIV. CODE § 51 (West Supp. 1999).

Under current law, religious institutions lack a free exercise defense to claims filed under Unruh. For example, suppose an Adventist school like Loma Linda University permits a local Girl Scout chapter, unaffiliated with the school, to meet on campus. Loma Linda could be held liable for discrimination if it failed to equally permit a Satanist group to meet.[55] Indeed, it could be compelled to permit the Satanists to meet on campus.

Because Unruh makes no exception for religious institutions, in the absence of a viable free exercise or RFRA defense, religious schools could be sued for discriminating in admissions on the basis of religion.[56] Although Adventist schools generally do admit students of all faiths, and do not discriminate, the freedom to define the student body is central to the religious mission. This freedom also extends to the ability to discipline students for violating lifestyle standards, a freedom that church schools currently lack.[57]

In closing, I would like to put the effort to pass State RFRAs in historical context. For hundreds of years before the American Revolution, Englishmen believed that Parliament protected their rights against usurpation by the crown.[58] The need to protect those rights against abuse by the legislative power first became an issue in colonial America. Thomas Jefferson was seeking a solution to this problem when he drafted the Virginia Statute Establishing Religious Freedom.[59] Evidently, he had not yet discovered the solution, as evidenced by the text, which admonishes future legislatures not to restrict or repeal the freedoms secured thereby.[60] Americans have taken for granted the solution that the founders finally adopted — to protect fundamental rights in a constitution that would bind future legislatures.

Our state RFRA battles are evidence that the Supreme Court has

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[55] The Unruh Civil Rights Act has been interpreted to apply to schools, which are considered "business establishments" and required to accommodate the public without discrimination. *See* Nichole M. by and Through Jacqueline M. v. Martinez Unified School Dist., 964 F. Supp. 1369 (N.D. Cal. 1997).

[56] Once the principle is established that schools are "business establishments" covered by the Unruh Civil Rights Act, the admissions and discipline policies of religious schools become legally actionable.

[57] Thankfully, I am unaware that the lack of de jure protection has had a chilling effect on student discipline, but it is only a matter of time before some disgruntled, disciplined student learns that his rights may have been violated.

[58] *See* JACK M. RAKOVE, ORIGINAL MEETINGS: POLITICS & IDEALS IN THE MAKING OF THE CONSTITUTION 35 (1996).

[59] *See* A DOCUMENTARY HISTORY OF RELIGION IN AMERICA, *supra* note 11, at 259.

[60] *See id.*

effectively reversed two centuries of progress, taking us back to pre-constitutional colonial America. We can no longer rely on constitutional protection, but must ask majoritarian legislative bodies to protect what has been, and should be, a fundamental right, protected against abuse by the majority. We face the difficult, but not impossible task, of convincing a deliberative body, accustomed to compromise, to accept that free exercise of religion is a fundamental right which cannot be compromised. In this effort, we join the illustrious company of Madison and Jefferson.

So perhaps we can learn a lesson from Madison's efforts to pass the Virginia Statute for Religious Freedom. Being a skilled legislative captain, Madison undertook a very successful petition drive to obtain grassroots support for the bill.[61] If religious liberty is to be protected by the majoritarian branch of government, the most important court in the land becomes the court of public opinion. The legislature reflects, however imperfectly, the public will. If the people do not cherish religious freedom, we have little hope of preserving its legal status.

D. Professor Douglas Laycock[62]

A key part of the political problem, in Congress and especially in the state legislatures, is this question of what difference RFRAs will make. In Congress, we have not handled that question very well, in part because everyone is busy and we have not done the kind of nitty gritty homework that it takes to uncover compelling stories. But more fundamentally, most of the good stories from my perspective as a civil libertarian turn out not to be good stories politically. What counts as an appealing example in this room does not begin to count as an appealing example in most legislatures. Steve Solarz, who sponsored the first Federal RFRA bill, said: "Religious liberty is popular in the abstract but it is controversial in its specific applications."[63] That is the heart of the problem. Too many examples invade the turf of some interest group on the other side who says, "Well of course they shouldn't be able to do that! Who do they think they are?"

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[61] *See* WILLIAM LEE MILLER, THE FIRST LIBERTY (1985).

[62] Alice McKean Young Regents Chair in Law, The University of Texas at Austin.

[63] This insight was commonly quoted among RFRA supporters in the debates over that bill in 1991-93, but it does not appear to have previously been recorded in the written record.

In addition, many examples that seem central from inside a religious tradition do not seem so important to someone who is outside the tradition. Many people — legislators among them — may not take their own religious tradition very seriously and have not spent more than a few minutes thinking about these problems. Unfortunately, many compelling stories often fail to arouse the interest of legislators.

In addition, there is ambiguity about what the various standards mean. What was the pre-*Smith* standard, and how many religious liberty claims succeeded under that standard? How many would succeed under RFRA? These cases are tough to win because courts often have the same reaction as politicians. The pre-*Smith* record was bad in reported cases in the lower courts, but it was not so bad in the Supreme Court[64] or in settlements.

I want to reinforce what Pat Nolan said. The common understanding of the meaning of *Smith* among government lawyers is: "We don't have to talk to you anymore. All laws are neutral and generally applicable. So we win. We do not have to justify our actions. We do not have to have a reason for not making exceptions; therefore we do not have to talk about not making an exception. Simply put, we do not have to talk to you." Bargaining and negotiating prove very difficult from this perspective. Threats to sue lack force because they believe they always win.

In the pre-*Smith* era and under RFRA, government officials had to justify a burden on religious liberty with a compelling governmental interest. While the exact standard was unclear, it certainly seemed high. At the very least, it provided a basis to begin a conversation. The threat to file a lawsuit was viable. Victories were difficult, and lawsuits expensive. But they were expensive for both sides, and both sides had a legal basis for their position, which provided a basis for meaningful discussion. Often these problems can be resolved in mutually acceptable ways with good faith negotiation. But there is no basis on which to negotiate if one side holds all the bargaining power. Before *Smith*, negotiated solutions were often possible; after *Smith* and without RFRA, they usually are not.

Negotiation was becoming more difficult even with RFRAs. Government officials are beginning to understand that a compelling

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[64] *See* Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 74 TEX. L. REV. 209, 222-28 (1994) (reviewing the Supreme Court's interpretation of the compelling interest test in free exercise cases).

interest does not mean much to many judges. Government officials are beginning to understand that they can abridge religious liberty and argue that they have not imposed a substantial burden. So it may be that, even with state RFRAs, some bureaucrats will refuse to talk and the threat to file a lawsuit will not be as effective as in the past. We not only have to get these bills passed, we must win some cases. State RFRAs provide a basis for a lawsuit and, therefore, a basis for settlement discussions, but unless religious claimants win some cases, their basis for discussion will remain weak.

I also think we have been too quick to concede that all laws are neutral and generally applicable. In fact, they often are not. A law forbidding discrimination on the basis of religion may not be a neutral and generally applicable law. It may apply to everyone, but it is a law dealing explicitly with religion — making religion a regulatory category — and I would challenge that even under the *Smith* standard. Many courts believe that zoning laws are neutral and generally applicable, but I do not think we should let that assumption stand unchallenged. Zoning laws are the antithesis of generally applicable laws. With anything as big as a church, zoning officials decide parcel by parcel. Every piece of land is regulated individually and with particularity. There is nothing generally applicable about zoning laws in most jurisdictions.

The recent Ninth Circuit case shows that it is possible to protect religious exercise with the hybrid-rights theory.[65] But I am not very optimistic about that; few courts have relied on this theory, and others have expressed serious doubts.[66]

Finally, only some of the battles over religious freedom involve legislatures and statutes. More often, such battles emerge from bureaucratic and administrative practice. They are fact specific, often not recurring patterns. The opponent of religious liberty often is not a legislator, but a career bureaucrat or a single-issue regulator.

Two early cases under the Florida RFRA provide appealing

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[65] *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702-11 (9th Cir. 1999) (finding hybrid rights in landlord-tenant dispute).

[66] *Compare id., and* People v. DeJonge, 501 N.W.2d 127, 134 (Mich. 1995) (finding hybrid right to home school), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring) (finding hybrid-rights doctrine "ultimately untenable"), *Thomas*, 165 F.3d at 722-26 (Hawkins, J., dissenting) (doubting existence of hybrid-rights doctrine), Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (rejecting hybrid-rights doctrine as illogical), *and* Salvation Army v. Department of Community Affairs, 919 F.2d 183, 199-200 (3d Cir. 1990) (holding that hybrid freedom of association claim adds nothing to free exercise claim).

examples of why we need such acts. In the first, the plaintiff lost his driver's license for ten years because he is a lay communion minister in a Lutheran church.[67] He had prior convictions for DWI and drug abuse; his license was probated for ten years on condition that he abstain from drugs and alcohol. He has been through a detoxification clinic. He is now clean. He mentioned to his probation officer that he was serving at the Lutheran church as a lay minister. The officer pulled his license because he was handling wine and taking communion. The state prosecutor defended the revocation in state court and promised to appeal if he lost. Cooler heads eventually prevailed; the case settled, and the state has promised not to revoke licenses over communion wine.[68] If this example of a state RFRA's benefits does not evoke sympathy from legislators, it is hard to know what example will.

In a second Florida case, the city of Boca Raton wants to bulldoze the tombstones in the municipal cemetery and begin enforcing a clause that has been buried in city's cemetery ordinance, never before enforced, and retroactively amended from time to time.[69] The clause says that tombstones (1) must be flat to the ground, and (2) can have only identifying information.[70] The clause thus prohibits religious inscriptions, crosses, stars of David, and Bible verses, permitting only names and dates. I thought that was a good example, but it had no impact in Washington, and the trial judge ruled for the city.[71] An appeal is pending.[72]

Often, if one looks beneath the surface, there is discrimination, hostility, and uneven enforcement of statutes and regulations. For example, the Mormons are the majority in Utah and my guess is that Utah and its local governments do not often infringe on their religious activities. If Mormons cannot protect their religious

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[67] *See* Noreen Marcus, *State: Communion During Probation a Sin; Churchgoer Fighting Driver's License Suspension*, FORT LAUDERDALE SUN-SENTINEL (Jan. 4, 1999) (available, for a fee, at <http://sun-sentinel.com/archive.htm>).

[68] *See* Noreen Marcus, *Communion Wine Won't Bar Minister from Driving*, FORT LAUDERDALE FLORIDA SUN-SENTINEL (Feb. 26, 1999) (available, for a fee, at <http://sun-sentinel.com/archive.htm>).

[69] *See* Warner v. Hanson, No. 98-8054-Civ-Ryskamp (S.D. Fla. Mar. 31, 1999).

[70] *See* Boca Raton City Council Resolution 185-82, § I(9), as amended by City Council Resolutions 182-88 and 119-96 (quoted and paraphrased in Verified Complaint 4-6, and in Plaintiff's Response to Defendants' Motion to Dismiss Complaint 5 n.3).

[71] *See* Ben Anderson, *Judge Mows Down Cemetery Religious Symbols*, CONSERVATIVE NEWS SERVICE (April 2, 1999) (available at <http://www.conservativenews.org/InDepth/archive/1999904/IND19990402c.html>).

[72] *See* ACLU Press Release, *Florida ACLU to Appeal Ruling on Religious Symbols in Cemetery* (Mar. 31, 1999) (available at <http://www.aclu.org/news/1999/n0331991.html>).

exercise in Utah, what church can protect itself anywhere?

In much of the rest of the country, Mormons are a small minority, poorly understood. Most Americans associate Mormons with polygamy, which they no longer practice. Another common misperception is that they are not really Christian. This also is not true; the full name of the church commonly called Mormon is the Church of Jesus Christ of Latter-day Saints. Dennis Rodman is probably not the only person who thinks they are a cult. People who call religions cults tend to use the term pejoratively. So when an administrative official with discretionary governmental authority outside Utah must make a decision to grant or deny a permit, a waiver, an exception, or license, or take some other action affecting a Mormon church or Mormon organization, it seems likely that, in his relatively unbounded discretion, these common misperceptions will affect the official's decision.

One of the cases described in the federal hearings on land use occurred in Forest Hills, Tennessee, a fairly well-to-do suburb of Nashville that historically has had four churches sitting near a big intersection — Methodist, Presbyterian, and two Churches of Christ. One of those churches closed. The Mormons bought the property and applied for a land use permit. The city denied the application, citing aesthetic reasons. A state trial judge affirmed the city's action.

The trial judge said that she could not find any actual discrimination of the sort she understood the *Smith* standard to require.[73] She though this was a neutral and generally applicable rule that just happened to prohibit new churches. The city's zoning code prohibited churches on any site except where the three existing churches were already located. Such a law is neither neutral nor generally applicable. It was in fact a total ban on new churches, with a grandfather clause for three familiar denominations.

I also fear that religious liberty is losing its status as a universal human right. Instead, many now perceive it to be only one of many special interests, and other special interest groups will take stands against religious liberty. Many factors, including the secularization of society, have reinforced this view of religious liberty as special interest rather than fundamental right. That view is further reinforced by the fact that other important social and political issues now line up to some extent on religious grounds. The national ACLU, which

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[73] *See* Corporation of the Presiding Bishop v. Board of Comm'rs, No. 95-1135 (Chancery Ct. Davidson County, Tenn. Jan. 27, 1998).

previously supported RFRAs, is now outside the coalition.[74]

If we are to succeed, we must restore the sense that religious liberty is for everyone, that it is a fundamental right. We must help government officials, special interest groups, state legislators, and the general public to understand that religious liberty is not just for conservatives, not just for Protestants or Christians, but for believers and nonbelievers of every variety. And even should we accomplish this, we are fighting an uphill battle.

E. Richard Foltin[75]

I was asked to speak about the Jewish community's perspective on RFRA. In most circumstances, I would approach with great trepidation any effort to speak on behalf of the Jewish community. In fact, we are a very diverse community in terms of belief, observance, and political viewpoint. There are public policy issues that split many of the Jewish groups that are part of the coalition and which support RFRA. Yet RFRA is one issue where one can speak for the entire Jewish community. The need for comprehensive legislation that protects free exercise of religious principles has achieved unanimous support among Jewish people.

The Coalition for the Free Exercise of Religion includes some twenty Jewish organizations, which run the gamut from The Agudath Israel to the Reform Movement and to all the nonaffiliated Jewish organizations in between. This unanimity reflects a profound and long standing recognition that we are a religious minority. As a religious minority we have all prospered in this great nation because of the profound and innovative notion encapsulated in the First Amendment: that the right of religious free exercise is fundamental and it is not to be abrogated by the majority's will. A deeper value that the First Amendment reflects is that members of the religious majority and minority alike are full and equal mem-

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[74] *See Religious Liberty Protection Act of 1999, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (forthcoming) (statement of Christopher Anders) (available at <http://www.house.gov/judiciary/ande0512.htm>). The Florida ACLU, by contrast, lobbied hard for Florida's RFRA and is appealing the judgment in *Warner v. Hanson*. *See supra* note 72 and accompanying text.

[75] Legislative Director and Counsel of the American Jewish Committee's Office on Governmental and International Affairs. Mr. Foltin has been active in the passage of a number of civil rights bills, including RFRA, the Religious Violence Act, and the Hate Crimes Statistics Act. In addition, he serves as co-chair of Committee on First Amendment Rights of the American Bar Association's Section on Individual Rights and Responsibilities.

bers of society. We are not guests; we do not enjoy our religious liberty at the will of others and at the sufferance of the majority. Practicing our religion is our fundamental right as human beings in this society.

This is why *Smith* and *Boerne* were such a profound shock to our community. *Smith*, especially, suggested that the protection of the free exercise of religion can be subject to the will of the majority.[76] It suggested we must lobby for legislation to protect religious liberty in the same way one lobbies for a greater share of an appropriations bill or for regulatory change.

There are three broad areas of concern that have developed with respect to particular observances of the Jewish community. While the impact is greatest on the orthodox community, because of stricter practice, these are important issues for all of the Jewish community, and for members of all religious communities. Moreover, although these issues do impact the orthodox most heavily, many other segments of our community also observe some or all of these practices as well. We are all victims of laws of general application to which no exceptions can be made.

The first issue I want to discuss is land use regulation. In traditional Jewish practice, one does not drive or take transportation on the Sabbath or on holidays. At the same time, there is an obligation on the Sabbath or on holidays to participate in communal worship. This means that one must live within walking distance of a synagogue in order to be a regular attendant at services on Sabbath or on a holiday.

Zoning laws that prohibit houses of worship from building in certain areas or otherwise place unreasonable restrictions on the building of those houses of worship, can effectively exclude Observant Jews from practicing their faith. This has the force of segregation for Jews within those communities comparable to the Jim Crow laws of an earlier time. The impact of these so-called laws of general applicability is that members of a particular religious community are not able to live in a particular community.

During the last couple of decades we have witnessed numerous instances where Jewish communities have battled these ostensibly neutral land use laws. Such laws substantially burden their communities' religious practices by not allowing Jews to worship within close proximity to where they live. Professor Douglas Laycock

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[76] *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

spoke this morning about the notion that a rule prohibiting a church from building in a certain location does not amount to a substantial burden. Courts reason that this is only a financial burden and nothing but money prevents the church from building elsewhere. However, given the religious context, a rule prohibiting the building of a church in close proximity to its members' residences should amount to a substantial burden. The clearest possible case is that of Orthodox observant Jews who are simply unable to practice as a community if those houses of worship cannot be built in reasonable proximity.

Sometimes clear evidence of animus in decisions against religious groups prompts courts to grant relief. I want to talk about a case that is relevant in the zoning context. The town of Airmont in upstate New York was carved from the larger village of Ramapo. The new town enacted a zoning law forbidding synagogues in private homes. Airmont was very close to a community where a great many Orthodox Jews lived. The impact of this new incorporation of a separate village was that orthodox Jews could not move into this adjacent community. The U.S. Attorney and affected residents filed a lawsuit challenging the village's zoning policy as discriminatory, enacted for the purpose of making it impossible for Orthodox Jews to live in Airmont.[77] Ultimately, a court found discrimination and steps were taken to remedy that situation. The record in that case clearly demonstrated the animus that was involved and the village's intention to prevent members of a particular faith from moving into the community.

More often, however, these zoning decisions are cloaked in neutrality. Zoning boards promulgate rules, now increasingly aware of the need to compile a record that does not betray animus. Such conduct can only be addressed by a legal framework that considers adverse impact as well as discriminatory intent.

Another similar case involved an attempt to get a zoning variance for religious prayer in a rented house in residential Los Angeles. A special use permit was sought to allow a prayer to take place in a home. The city council denied the permit. One neighbor testified against the permit, saying: "If you permit this illegal use, how do you rationally prevent Muslims from setting up their

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[77] *See* LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995) (reinstating jury verdict finding liability); LeBlanc-Sternberg v. Fletcher, 1996 WL 699648 (2d Cir. 1996) (unpublished disposition) (granting injunctive relief).

things, Hindus from having their temples. Once you open the door you will ruin a beautiful asset."[78] So I think we have enough of these cases, enough anecdotal information and statistical evidence, to show that there is a very real problem. We must work to prevent municipalities from promulgating zoning rules, seemingly neutral, but which serve as a means of excluding houses of worship.

I would like to mention one other case in the zoning area that involves a personal experience. Before I moved to Washington, D.C., I lived on Long Island close to a synagogue in North Woodmere. The synagogue was in a house that was being used as a synagogue. Although the synagogue had never really caused any traffic problems, it did not adhere to the local zoning regulations that required minimum parking for houses of worship. When the local zoning board considered an application for a variance, it did not consider that this house of worship was an Orthodox synagogue, or even that on the High Holidays there was no tangible increase in vehicular traffic. The board, of course, denied the variance.

Thankfully, the Appellate Division found a free exercise interest that the zoning board had not adequately taken into account, and the case was remanded and ultimately resolved on terms favorable to the synagogue.[79] However, this is not a typical result. Such cases are difficult to win, although courts in the northeast tend to be more favorably inclined towards houses of worship.

Another area I want to discuss involves religious ritual practices. Laws of general applicability have tremendous potential to impact various aspects of Jewish ritual observance. By the very nature of general rules, they accommodate behavioral norms, not the ritual religious practices of minorities. Consider the case of *Goldman v. Weinberger*,[80] where an officer was disciplined for wearing a yarmulke while on duty in a military hospital.[81] He was told he could not do that because it was a violation of military regulations that forbade the wearing of any head coverings while indoors. Aside from the issue of great deference to the military, the subtext of this case was the rule of general applicability. The regulation applies to

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[78] Congregation Etz Chaim v. City of Los Angeles No. 97-5042 HLH (Ex) (C.D. Cal. 1997).

[79] *See* Young Israel of North Woodmere v. Town of Hempstead Board of Zoning Appeals, 634 N.Y.S.2d 199 (App. Div. 1995).

[80] 475 U.S. 503 (1986).

[81] *See id.* at 504-05.

all military personnel, of all religions.

Alan Reinach spoke earlier about the need for Sabbath accommodation by government employers. This holds true for any government controlled facility whether one is in a school, a courtroom, in the military, or in a prison. There is a real potential for conflict between the government rules regarding administration of its facilities and how one is to behave in terms of the ability to observe Shabbat, to wear a yarmulke, or to receive kosher food.

Another area that has come into conflict — and this is one of the classic cases for those who have followed the history of RFRA — is the issue of the right of the family of those who are killed in traffic accidents or other nonsuspicious events to be free of religiously prohibited autopsies or other "routine" postmortem procedures. One famous Rhode Island case involved a member of the Hmong faith who was killed in a traffic accident.[82] State authorities performed an autopsy despite the fact that this was a traffic accident in which there was no suspicion of foul play, nor any compelling law enforcement need why an autopsy should have been required. Nevertheless, following the *Smith* decision, a court said there was nothing it could do — the family simply had no remedy under federal civil rights law against the state for this violation of a deeply held religious belief.[83]

Given these examples, one can easily anticipate other situations. A state, for example, might decide to amend its humane slaughter laws, to prohibit kosher slaughter. Observant Jews would no longer be able to obtain meat to eat in any such state, on the grounds that this is ostensibly not a form of humane slaughter. Or suppose a state decided that circumcision was a harmful and inappropriate procedure and outlawed the practice. Once again there would be no legal recourse to challenge such a ruling.

These are not really hypothetical circumstances. At one point the U.S. Department of Agriculture proposed meat and poultry processing regulations which were designed to remove harmful bacterial pathogens. There was potential that those rules could create a serious problem for the kosher preparation of meat because they were inconsistent with the processing that was required when meat is salted and soaked in order to make it kosher. Had those rules been enforced it might well have meant that observant

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[82] *See* Yoo Vang Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

[83] *See id.*

Jews could not eat meat or poultry processed in the United States. This was brought to the attention — and I have to congratulate my colleagues at the Agudath Israel for doing this — of the Department of Agriculture. The regulations were amended because the Department of Agriculture was sympathetic. They found a way to amend the regulations to address the safety issue without precluding kosher slaughter. A less sympathetic administration could easily have led to a different result.

The final issue that I want to touch upon is that of discrimination. It is crucial to understand that while the anti-discrimination laws are of great importance to all of us — and many of our organizations continue to fight for additional laws to protect against discrimination — we must be cognizant of the fact that these laws sometimes conflict with the needs and beliefs of religious institutions. Orthodox rabbinical schools ordain men only. Sexes are separated during prayer services in orthodox synagogues. Many Orthodox Jewish schools are single sex institutions. Further, for some Jews, the religion is understood to proscribe a woman from teaching a class of boys. Neutral and generally applicable sex discrimination rules would seriously hamper the ability of some to adhere to religious practice in the operation of their religious schools.

I want to conclude with two brief thoughts. First, we have talked about the lack of horror stories to evoke support in legislatures. Part of that is due to a lack of research. But I also think there are still people in government who are not instinctive bureaucrats, and who recoil at the idea of discrimination and are willing to accommodate. Nevertheless, the longer we continue with a legal regime in which religious practice is not protected, the more danger we are in that hostile and discriminatory attitudes will increase and permeate society at large. So, we really have to be vigilant. The fact that we do not have enough horror stories yet should only impress upon us the urgency of this effort, so that such horror stories do not ever occur.

Finally, there have been many reasons suggested this morning for why we are seeing an increase in the number and kinds of cases and conflicts between the religiously observant and government regulation. In my view, this is attributable both to the increased religious diversity in our society, and to the growth of the regulatory state. As government promulgates more regulations, there is a greater risk of conflict between these regulations and the needs of

those who are members of a minority faith, who march to a different drum than the majority. If we are to be a truly pluralistic and diverse society, we have to insure that religious conscience is respected and that the regulatory state does not unduly infringe on religious belief.