REFLECTIONS ON FREE EXERCISE: REVISITING *ROURKE V. DEPARTMENT OF CORRECTIONAL SERVICES*

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To offer a critical perspective on federal free exercise law,[1] I would like to focus in this talk on a case that I argued in the early 1990s only a few miles from the Albany Law School. At the time I was a law professor at Cornell, and I was handling the case as part of a religious liberty clinic that I co-taught for a number of years with Glenn Galbreath, an experienced and tremendously able clinical faculty member at Cornell. It was a wonderful case, and we litigated it over the course of several years, starting with a successful motion for summary judgment on the free exercise claim and concluding with a successful motion for attorney fees.

The case, *Rourke v. Department of Correctional Services*,[2] was decided at the trial court level in August 1993 by Justice Keegan of the New York State Supreme Court for Albany County. In granting our motion for summary judgment, Justice Keegan relied on state constitutional free exercise grounds, specifically article I, section 3 of the New York State Constitution.[3] Justice Keegan prohibited enforcement against our client, a Native American prison guard, of a state Department of Corrections hair-length policy for prison guards set forth in a state-wide directive. Our client, Raymond

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[1] The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. It applies to state and local governmental action by virtue of the Fourteenth Amendment's Due Process Clause. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[2] 603 N.Y.S.2d 647 (Sup. Ct. 1993), *aff'd*, 615 N.Y.S.2d 470 (App. Div. 1994).

[3] According to N.Y. CONST. art. I, § 3:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

Rourke, adhered to the Longhouse religion, the traditional Mohawk religion. One teaching of the religion links hair length to spiritual potential: the longer one's hair, the closer one comes to the Creator; and short hair shows disrespect for the Creator and limits one's spiritual potential. The Department dismissed Mr. Rourke for abiding by his religious beliefs and refusing to cut his hair. Justice Keegan ordered Mr. Rourke reinstated with back pay, and his judgment was affirmed in June 1994 by the Appellate Division, Third Department.[4]

The case actually got a fair amount of play both in New York and outside New York. Several years after the Appellate Division's affirmance, I happened to mention to Douglas Laycock, a leading Free Exercise and Establishment Clause scholar now at the University of Michigan,[5] that I had litigated the *Rourke* case. I was surprised and delighted when he said "That case is famous."

The case was distinctive in a number of ways. One was the client. Mr. Rourke was truly the model client. You simply could not have a better client. He exemplified standing on principle—in this instance, religious principle. He went through quite an ordeal. Fired from his job for abiding by his religious beliefs, he, his wife, and their two children depended for their sustenance on unemployment insurance benefits. Remarkably, despite being made to suffer for adhering to his deeply felt beliefs, Mr. Rourke never took out his frustrations on his attorneys. In fact, quite the contrary. He often thanked me, Glenn Galbreath, and our students and showed appreciation for what we did. After the Appellate Division had affirmed Justice Keegan's order of reinstatement with back pay, I invited Mr. Rourke to come to Cornell Law School to speak to the student body about the case. It was an incredibly moving experience, particularly when he said aloud a prayer in gratitude for the assistance that he had received.

On a broader level, the *Rourke* case stands out because it helps highlight so well how problematic *Employment Division v. Smith*[6] is. Although Justice Scalia's majority opinion in that case did not acknowledge that it was discarding a free exercise approach that had been in place for many years, the opinion in fact turned existing

[4] Rourke v. Dep't of Corr. Servs., 615 N.Y.S.2d 470 (App. Div. 1994), *aff'g* 603 N.Y.S.2d 647 (Sup. Ct. 1993).

[5] *See, e.g.*, Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 [hereinafter *Remnants of Free Exercise*].

[6] 494 U.S. 872 (1990).

free exercise law on its head. With minor exception, it abandoned the core free exercise principles[7] that (1) a law having the effect of interfering with one or more individuals' free exercise of religion may be challenged as applied and (2) a substantial burden on one or more individuals' free exercise may stand only if necessary to serve a compelling state interest. The *Rourke* case memorably illustrates the importance of these principles. It demonstrates how lawmakers and administrators in a system based on majority rule cannot be relied on to be sensitive to, or respectful of, the needs and beliefs of religious minorities. It also shows the great hardships that some people will endure rather than act contrary to their religious beliefs.

The *Rourke* case is also noteworthy because it exemplifies the importance of state constitutional law. Prior to *Employment Division v. Smith*, the New York courts essentially had interpreted the New York State Constitution's Free Exercise Clause no differently than the U.S. Supreme Court had interpreted the federal clause.[8] The *Rourke* case was the first reported decision since *Smith* dealing with the New York Constitution's free exercise provision. We made the argument that the New York courts should not feel obliged to cut back on the scope of the New York clause simply because the U.S. Supreme Court had decided to do so with the federal clause. We were in the interesting, and in some ways enviable, situation of telling a New York court that it just ought to keep doing what New York courts had been doing for years. Our message was relatively simple: although the Supreme Court in *Smith* claimed that it was not doing anything new, it obviously was; and a New York court interpreting the New York Constitution was under no obligation to follow its lead.

The *Rourke* case therefore provided us with a wonderful opportunity to argue that the majority's approach in *Smith* was fundamentally flawed. In the second panel discussion today, Professor Hesse is going to discuss *Smith* in detail. For the most part, I would like to leave it to him to lay bare the flaws in the *Smith* approach. However, Justice Scalia's majority opinion in *Smith* is so unbelievably inadequate that I feel obliged to make a few remarks. The opinion's deficiencies range from reaching out to decide a major constitutional issue that was neither briefed nor argued by the parties, to radically rewriting history in describing

[7] *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Sherbert v. Verner, 374 U.S. 398, 403, 407 (1963).

[8] *See, e.g.*, People v. Woodruff, 272 N.Y.S.2d 786, 789-90 (App. Div. 1966), *aff'd mem.*, 236 N.E.2d 159 (N.Y. 1968); Brown v. McGinnis, 180 N.E.2d 791, 792–93 (N.Y. 1962).

the Supreme Court's prior free exercise decisions, to treating minority opinions and overruled decisions as the law of the land.[9] I never thought I would see the *Gobitis* case,[10] which the Court in *West Virginia State Board of Education v. Barnette*[11] had long since expressly overruled, cited favorably by the high court as if it were still good law.

Reasonable arguments have been made by Professor William Marshall and others in defense of the Supreme Court's holding in *Smith*.[12] Such arguments not only reject the notion that the necessary-to-a-compelling-interest test is an appropriate means of deciding the validity under the Free Exercise Clause of an as-applied attack; more basically, they reject altogether the notion of as-applied attacks under the Free Exercise Clause. Ultimately, I am not convinced by these arguments, but there is no denying that they are thoughtful, sensible, and made in good faith. Unfortunately, the same cannot be said of the majority opinion in *Smith*, which is simply a debacle. It still amazes me that anyone on the Court would write it and, even moreso, that four other Justices would sign on to it.

To help explain why the *Rourke* case is so compelling, let me briefly fill in more of its facts. At the time of the events giving rise to litigation and since, Mr. Rourke has lived on the Mohawk reservation that straddles the border of Canada and New York. In 1989, he was hired as a corrections officer in the Riverview Correctional Facility in Ogdensburg, New York. He was not particularly religious at the time. However, a year later, tensions on the reservation over a proposed gambling establishment came to a head in an uprising that resulted in a number of deaths. One of Mr. Rourke's cousins was one of the casualties. Subsequently, Mr. Rourke's religious faith greatly deepened, and he came to believe that if those on the reservation had followed more conscientiously the precepts of the Longhouse religion, the tragic uprising would not have occurred. Part of his becoming more religious was to stop cutting his hair.

By April 1991, his hair length violated the state-wide directive for

[9] For commentary highly critical of *Smith*, see Laycock, *Remnants of Free Exercise*, *supra* note 5; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

[10] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[11] 319 U.S. 624 (1943).

[12] *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV 308 (1991).

prison guards limiting hair length in the back to no more than half an inch below the top of the shirt collar. In the summer of 1991, a deputy superintendent of security told Mr. Rourke to cut his hair. When he refused on religious grounds, the deputy superintendent told him to put it in a ponytail, which he did. He did not hear another word about the matter for over a year, during which time he continued letting his hair grow while keeping it neatly tied in a ponytail.

In August 1992, he received notice of a hearing in late September about his hair length. At the hearing he testified to the religious basis for his refusal to cut his hair. Later that day he was ordered by another deputy superintendent of security to cut his hair, and when he refused, he was suspended without pay. He could not find other employment, and he, his wife, and two children lived on unemployment insurance benefits from the state Department of Labor. The Department of Correctional Services actually tried to prevent him from receiving the unemployment benefits, unsuccessfully contesting before an Administrative Law Judge his right to such benefits. Rather obviously, Mr. Rourke's dismissal was hardly the result of some sort of administrative confusion or miscommunication. The state was fighting him ferociously, challenging not only his right to remain on the job, but even his right to maintain some basic level of sustenance.

The justifications that the state offered for dismissing Mr. Rourke were uncompelling to say the least. One of its arguments was that his having long hair posed a threat to his personal safety. The state's thesis appeared to be that prisoners could easily grab and pull his long hair to gain an advantage over him. The state also argued that there is an important interest in order and discipline that is served by uniformity in appearance. The thinking here was that if the guards all look the same, it establishes a valuable esprit de corps among the guards and also encourages the prisoners to treat them with respect.

A major difficulty with these justifications is that the state virtually conceded their insignificance by pursuing them so inconsistently. Consider, for example, that the Department of Corrections allowed female guards to wear their hair long provided that they kept it pinned up—an option that Mr. Rourke had made clear was entirely acceptable to him. Presumably, the Department is no less concerned about the personal safety of its female guards than its male guards. If so, and if safety is really a concern behind limiting hair length, why would the Department only prohibit male

guards from having long hair? Why not female guards as well?

Similarly, the justification in terms of uniformity—the importance to order and discipline of the guards' all looking the same—was difficult to credit in light of various allowances that the state-wide directive made for disuniformity in appearance among the guards. For example, guards hired before 1990 could have beards, but guards hired afterwards could not. Mustaches were optional. Personal jewelry was generally prohibited, but exceptions were made for MIA/POW bracelets and military or class rings.

However, if, as *Employment Division v. Smith* holds, the state need not offer a weighty justification for requiring an individual to abide by a neutral, generally applicable law that happens to burden his or her free exercise of religion, the state's meager justifications for insisting that Mr. Rourke abide by the hair-length directive sufficed. Unless, as almost never occurs, the state was acting without the minimal amount of reasonableness required to satisfy due process,[13] Mr. Rourke's constitutional challenge was doomed.

Smith does leave room for challenging in its entirety a law that targets a particular religious group for disadvantage. This is nice in theory, but of limited importance. It does happen, as the *Rourke* case exemplifies, that lawmakers pass generally applicable laws that adversely affect adherents of particular religious beliefs. In such instances the legislators at times may fairly be charged with undue ignorance of, or insensitivity toward, the religions whose adherents are hit hardest by their laws. However, unless, as rarely occurs and as even more rarely can be proven to exist, the legislators passed the law out of a positive desire to harm adherents of a particular religion, the "targeting" that *Smith* recognizes as a free exercise problem simply does not exist.[14]

Another narrow avenue for constitutional attack acknowledged by the Court in *Smith* pertains to "hybrid" claims.[15] Although *Smith* rejected as-applied challenges based on the Free Exercise Clause alone, it permitted such challenges when a law interferes simultaneously with a claimant's free exercise right and another

[13] For classic statements of the lack of rigor of reasonableness review (also referred to as "rationality" or "rational basis" review) under the Due Process Clause, see Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 487–88 (1955).

[14] A few years after dividing sharply among themselves in *Smith*, the Justices unanimously agreed to invalidate some Hialeah, Florida ordinances that presented a rare, but virtually unmistakable, example of a lawmaking body targeting a particular religious group for disadvantage—in this instance, adherents of the Santeria religion. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[15] *See* Employment Div. v. Smith, 494 U.S. 872, 881–82 (1990).

right on the claimant's part of constitutional dimension. When the Court in *Smith* noted the existence of this hybrid exception, it was being less than candid. In maintaining that it somehow matters—and has mattered to the Supreme Court in the past—whether a free exercise claimant can fairly claim interference with both free exercise and another constitutional right, the Court rather obviously was simply trying to avoid having to overrule certain free exercise cases, such as *Wisconsin v. Yoder*,[16] that had become so entrenched that overruling them was almost unthinkable.

The Court in *Smith* never explained why free exercise takes on special importance when allied with a right of independent significance. However, taking advantage of this loophole in *Smith* for as-applied attacks, we argued in the *Rourke* case that a hybrid right was at stake. We maintained that Mr. Rourke's wearing his hair long was symbolic expression protected by the Free Speech Clause of the First Amendment.[17] I cannot say that we believed that our hybrid claim challenge was very likely to prevail. We did think, though, that it was sufficiently plausible so that a court that disliked *Smith* could very respectably seize on it and make it the basis of the court's decision.

Ultimately, the court never ruled on our hybrid claim. We did very well, however, to argue it because doing so enabled us to secure attorney fees under federal law. To qualify for attorney fees under the federal statute, one needed to prevail in the litigation but not necessarily on a federal ground. It was sufficient that the fee claimant had argued a substantial federal claim.

In the time between the trial court and appellate court decisions in *Rourke*, Congress enacted the Religious Freedom Restoration Act.[18] For all practical purposes, the Act sought to overrule *Smith* pursuant to Congress's authority under section 5 of the Fourteenth Amendment.[19] Although we cited the Act for support in our

[16] 406 U.S. 205 (1972) (holding that Amish parents are constitutionally entitled to an exemption from state compulsory education laws insofar as, for religious reasons, they do not allow their children to receive formal education beyond eighth grade). For the *Smith* Court's attempt to characterize *Yoder* as a "hybrid" case, see *Smith*, 494 U.S. at 881.

[17] For instances in which the Supreme Court has recognized and protected symbolic expression, see, for example, Texas v. Johnson, 491 U.S. 397 (1989) (burning flag); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (wearing black arm band).

[18] 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

[19] The Due Process Clause contained in section 1 of the Fourteenth Amendment has been held to incorporate the First Amendment's guarantee of free exercise of religion. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). According to section 5 of the Fourteenth Amendment, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Congress therefore has some power under section 5 to "enforce" the Due Process Clause of section 1, including that clause's incorporation of free exercise. For opposing views

appellate brief, the Appellate Division did not rely on it. Several years later, the Supreme Court, with virtually unanimous agreement among the Justices on a narrow conception of Congress's section 5 powers, struck down the Act as it applies to state and local government.[20]

Faced with the very uninviting precedent of *Smith*, we spent almost our entire brief on New York, rather than federal, constitutional law. Relying on criteria developed over the years by the New York high court,[21] we spent a significant part of the brief arguing that the New York Constitution's free exercise clause should be interpreted more broadly than the federal Constitution's. More specifically, we argued that the New York constitutional provision should be interpreted as affording the level of free exercise protection that the federal clause had been understood to provide pre-*Smith*.

Clearly, this was our best argument, but it was hardly a sure winner. Unbelievably—and this cannot be reassuring for those of you already concerned that your tax payments to New York State are not being put to good use—the state in responding to our brief did not contest our very contestable argument that the state free exercise clause should be interpreted as the Supreme Court had interpreted the federal clause pre-*Smith*. Instead, the state chose to reserve all its firepower for the virtually unwinnable argument that the necessary-to-a-compelling-interest test triggered pre-*Smith* by a substantial burden on free exercise was met.

Ultimately, then, thanks in part to the state's strategically rather mystifying defense, Justice Keegan granted our motion for summary judgment on state constitutional grounds and the Appellate Division affirmed. The New York Court of Appeals recently interpreted the relevant state constitutional provision as somewhat less protective of free exercise than Justice Keegan had maintained.[22] Mr. Rourke's success in the New York courts,

as to whether section 5 provided authority for enacting the Religious Freedom Restoration Act, see Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995) (yes); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995) (no).

[20] City of Boerne v. Flores, 521 U.S. 507 (1997).

[21] With regard to the "interpretive" and "noninterpretive" factors articulated by the New York Court of Appeals as central to whether, in construing state constitutional provisions, a court should go beyond Supreme Court interpretations of similar federal constitutional provisions, see People v. P.J. Video, Inc., 501 N.E.2d 556, 559–61 (N.Y. 1986).

[22] Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006). Like Justice Keegan in *Rourke*, the Court of Appeals held that generally applicable laws could be challenged as applied for interference with the New York Constitution's free exercise

however, attests to the significance of state constitutional law in an era in which the U.S. Supreme Court has been cutting back on free exercise and other individual rights protections. On an even more basic level—and here, as former counsel to Mr. Rourke, I concededly speak with a less than impressive claim to objectivity—the success of this principled and genuinely courageous man inspired optimism that, in our system of justice, Davids can still slay Goliaths from time to time.

Mr. Rourke's fate, however, never should have turned on Justice Keegan's willingness to accept our rather innovative arguments under state constitutional law. Properly understood, the federal Free Exercise Clause provides the protection that the New York courts in the *Rourke* case found in state constitutional law. It is difficult to believe that the Framers of the federal Constitution, who valued religious liberty so highly, would have relegated it to so peripheral a status and put it so much at the mercy of majoritarian beliefs and insensitivities as *Employment Division v. Smith* assumes.

Let me end with a personal note on Mr. Rourke. Although he had prevailed on his state constitutional claim and been granted reinstatement with back pay, Mr. Rourke was not entirely content. Very understandably, he also wanted a transfer from the prison where his superiors had treated him and his religious beliefs with such disrespect. We still had a claim for additional relief that we could have pursued. In a telephone conversation with the lead attorney in the case for the state, I said that we would not litigate this claim as long as the state transferred Mr. Rourke to the prison of his choice. To my surprise, this attorney who had been so

guarantee. However, while Justice Keegan held that a substantial burden on free exercise violates the state constitution unless the state can prove that imposing the burden is necessary to serve a compelling state interest, the Court of Appeals held that such a burden should stand unless the free exercise claimant can prove that the burden is "an unreasonable interference with religious freedom." *Id.* at 466.

Whether or not the Court of Appeals' standard is substantially different in practice than the one articulated by Justice Keegan remains to be seen. As the Court of Appeals noted in its opinion, *id.* at 466–67, and as others had noted before, see, for example, Gary J. Simson, *Endangering Religious Liberty*, 84 CAL. L. REV. 441, 459–60 (1996), the U.S. Supreme Court as well as lower courts have been much more willing to find that the state has met a necessary-to-a-compelling-interest test in the free exercise area than in the equal protection area. Indeed, while courts in equal protection cases typically have found that the state has not met this "strict scrutiny" test, they typically have found in free exercise cases that the state has met the test. The reasons for this difference in applying the test are open to debate, *see id.*, but whatever the reasons may be, the reality is that the test articulated by the Court of Appeals in *Catholic Charities* may not produce substantially different results than the test to which Justice Keegan subscribed.

uncompromising in the past immediately agreed. I remember thinking at the time how much the tables had turned since the bleak day when Mr. Rourke was summoned to a hearing, ordered to cut his hair, and sent home with no relief in sight for adhering to religious beliefs that he held dear.