July 2015

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THE FREE EXERCISE OF RELIGION

by

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Freedom of speech and of the press, guaranteed by the First Amendment,[1] is today regarded to be our most preferred freedom. Justice Cardozo once said this freedom is the matrix, the indispensable condition of nearly every other freedom.

But, to the Founding Fathers, freedom of religion was regarded to be preeminent among fundamental rights. And for good reasons. The immediate forebearers of the Framers of the Constitution, emigrated primarily because they were denied the right freely to exercise their respective religious beliefs not sanctioned by the established Church of England. The Colonists were religious dissenters. They adamantly insisted upon their fundamental rights to follow their own conscience in religious matters and wrote it in our Bill of Rights.

Thomas Jefferson, before his demise, wrote his own epitaph which is engraved on his tombstone. He listed, as his three greatest achievements, . . . Author of the American Declaration of Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia.

The Statute for Religious Freedom, which Jefferson regarded to be one of his three crowning accomplishments, apparently even more than the Presidency, was enacted in 1786, preceding the ratification of the Constitution and the Bill of Rights. This statute declared, in effect, as does the First Amendment, that no law may be passed prohibiting the free exercise of religion.

Thus, by express language and by historical intent, the First Amendment mandates that government must keep its hands off of religion, religious groups and their practices.

Matthew, Chapter 22, Verse 21, said it well: "Render therefore unto Caesar the things which are Caesar's, and unto God the things which are God's."

The Constitution and the Bible are at one on this transcendent matter.

But, the Supreme Court, in the so-called Yarmulke case, has departed both from Constitution and Bible.

The facts of this case are undisputed.

S. Smicha Goldman, a non-practicing Rabbi but devout Orthodox Jew, entered active service in the United States Air Force as a commissioned

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[1]U.S. CONST. amend. I.

officer.[2] He is a qualified clinical psychologist, but not a military chaplain.[3] In accordance with the precepts of his faith, he wore a Yarmulke indoors at a military health clinic, while on duty at March Air Force Base in Riverside, California.[4] He performed his professional duties, in this capacity, for four years. In compliance with military regulations he covered his head while outside the clinic by wearing a regulation service cap.[5] This conformed with the Orthodox Jewish requirement that his head be covered.

It was not until he testified on behalf of a defendant in a court martial proceeding that a formal complaint was lodged against him by an obviously disgruntled military prosecutor, that Captian Goldman's practice of wearing his Yarmulke was in violation of an Air Force Regulation.[6]

The pertinent Regulation states that "headgear will not be worn . . . while indoors except by armed security police in the performance of their duties."[7] The other military services have similar regulations.

Prior to this complaint, Captain Goldman had received extremely high ratings in his performance evaluations. Indeed, one of his evaluators noted: "He maintains appropriate military dress and bearing."[8]

After this complaint, Captain Goldman received a formal letter of reprimand and was warned that failure to obey the Air Force regulation requiring that no headgear may be worn indoors would subject him to a court martial.[9] His commanding officer also withdrew a recommendation that Goldman's application to extend the term of his active service be approved and substituted a negative recommendation.[10]

Captain Goldman then sued to enjoin the regulation.

The Supreme Court of the United States, in a divided opinion (5-4) affirmed the regulation.[11]

To paraphrase Justice Holmes, bad cases, like great cases, make bad law. The Yarmulke case makes bad law.

First and foremost, it undermines our constitutional commitment to religious freedom and acceptance of religious pluralism, on the alleged ground of military necessity, unsupported by any credible evidence or explanation.

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[2]Goldman v. Weinberg, 106 S. Ct. 1310 (1986).

[3]*Id.* at 1312.

[4]*Id.*

[5]*Id.*

[6]*Id.*

[7]*Id.*

[8]Goldman v. Weinberg, 739 F.2d 657 (D.C. 1984).

[9]*Goldman*, 106 S. Ct. at 1312.

[10]*Id.*

[11]*Id.* at 1314.

Further, it constitutes a judicial erosion of the Free Exercise Clause of the Constitution. It is reminiscent of a prior Supreme Court decision sustaining the constitutionality of the Sunday Closing Laws.[12] These laws compel Orthodox Jews, Seven Day Adventists and Moslems to choose between their religious faith and economic survival since they also must, in deference to their religious obligations, close their business establishments on their Sabbath. This is not only a cruel choice but, to me, a gross violation of their constitutional right to the free exercise of religion.

Of course, the Yarmulke case is different. It involves the military. And the Supreme Court has held that, by its very nature, the military must be able to command service personnel to sacrifice a great many of the individual freedoms they enjoyed in the civilian community and to endure certain limitations on the freedoms they retain.

But not all! For the Supreme Court has also decided that ". . . our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[13]

All justices of the Court, in majority or dissent, acknowledged that, for Orthodox Jews, the wearing of a Yarmulke is a traditional religious obligation. It is a matter of faith — an expression of respect for God, intended to keep the wearer aware of God's presence.

The basic justification offered by the military in support of this regulation is that military discipline and morale depends upon "esprit de corps" of the armed services and that it is the professional judgment of the military that outfitting of personnel in standardized uniforms encourages habits of discipline and unity.[14] The military, however, offered no outside expert evidence that the unobtrusive wearing of a Yarmulke by a clinical psychologist in a military mental health clinic promotes disunity and lack of discipline in the armed forces.

Further, the evidence is to the contrary. Goldman wore his Yarmulke for years at the clinic without any formal complaint deemed serious enough to act upon. And, as Justice Stevens pointed out in a concurring opinion in the Yarmulke case, there was good reason to believe that the lodging of the complaint "had a retaliatory motive" since Goldman testified for the defendant in a court martial proceeding.[15]

It is, of course, true, as I have said, that military personnel, by the very nature of things, do not enjoy the same individual autonomy as there is in the larger civilian community,[16] but, nevertheless, as the Court itself has said, they are not entirely stripped of basic rights.

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[12]McGowen v. Maryland, 366 U.S. 420 (1961).

[13]Chappell v. Wallace, 103 S. Ct. 2362 (1983).

[14]*Goldman*, 106 S. Ct. at 1313.

[15]*Id.* at 1315 (Stevens, J., concurring).

[16]*Id.* at 1313.

The Court, in the Yarmulke case, had to strike a pragmatic balance between the Constitutional mandate of free exercise of religion and military requirements. In light of the importance of free exercise of religion in our constitutional scheme and the absence of any credible and impartial evidence (as distinguished from in-house military testimony) establishing military necessity for banning the wearing of a Yarmulke by Orthodox Jews in service, the Court struck the balance in the wrong way and with a surprising lack of sensitivity for the multiplicity of religious beliefs of our citizens — civilian and military.

During my tenure on the Court, I wrote an opinion saying that: "[Our Constitution] is not a suicide pact."[17] Indeed, it is not. The Constitutional power "to raise and support Armies is broad and sweeping." But, so is the Free Exercise Clause of the First Amendment.

The essential question in the Yarmulke case is this. Was there an overriding military necessity justifying the abridgement of a fundamental right specifically protected by the First Amendment?

A Yarmulke is a most unobtrusive religious article, as demonstrated by its customary size, 5½ inches in diameter. Since it is pinned on the back of an observant Jew's head it is barely noticeable. And those who do notice the Yarmulke, gentile and Jews alike, by and large, accept this as symbolic that we have a pluralistic society. Members of our Armed Services consist of a cross section of our community with various ethnic and religious backgrounds. The Supreme Court itself recognized "Yarmulkes are generally understood to be a form of religious observance . . . They are increasingly visible . . . Attorneys wearing Yarmulkes can be found in the state and federal court houses of New York, and attorneys wearing Yarmulkes have been permitted to sit in the "Bar Section" of this Court and attend oral arguments."[18] This should be a source of pride to us — not a source of disruption to our Armed Forces, as is evidenced by the fact, which I repeat again, that for years no formal charge was leveled against Dr. Goldman for wearing his skull-cap indoors in a hospital while performing his duties.

The ultimate argument of our military services, accepted by the Court majority, reduces itself to this. The military depends upon uniformity in dress, even of an unobtrusive character, to maintain morale and discipline. But no expert evidence, except in-house, was proffered by the Air Force in support of this thesis.

The historical and contemporary evidence is to the contrary.

Many high ranking generals of the Indian Army are Sikhs wearing turbans and beards, according to the precepts of their faith. And, despite the troubles at Amistar, Sikhs of the Indian Army, comprising ten percent of the services, are recognized to be highly disciplined and to enjoy high morale.

[17]Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

[18]*Goldman*, 106 S. Ct. at 1314, n.1 (Stevens, J., concurring).

And, to this day, there are turbanned and bearded Sikhs in the British Army. And, there are also Gurkhas, wearing their native costumes and weapons. Gurkhas are perhaps the most feared, by adversaries, because of their courage and exemplary discipline. And we have the Scots. They, serving in the British Forces, are led by bag-pipers wearing kilts, not battle dress.

Parenthetically, the Supreme Court itself, on occasion, wears Yarmulkes. When a new justice is sworn in, as part of his GI judicial regarlia, he is issued a Yarmulke. This is designed to protect old, bald and aging justices from inclement weather which, more often than not, seems to occur on Inauguration days. Witness, the famous picture of Chief Justice Hughes, widely reproduced, wearing a Yarmulke swearing in President Roosevelt. And the Pope and Bishops wear skull caps in celebrating the Mass and often elsewhere. Moslems too cover their heads during religious services.

I concede that we have progressed from the "rag-tag band of soldiers" (a rather singularly inappropriate phrase of the Court, in light of our history)[19] who won our Revolutionary War of Independence. Today, of course, uniforms are prescribed for the United States armed services, if only because we can now afford them. But minor variations in uniforms, in deference to the Free Exercise Clause, particularly not in combat zones, but, indoors, in a military hospital, clinic, headquarters or the like, are really *de minimus* exceptions to uniform requirements.

Absent any expert evidence, other than the *ipse dixit*[20] of the Armed Forces and its bureaucracy, that uniform headgear regulations must be observed indoors are required to maintain discipline, this seems to me to reflect a "spit and polish" attitude of military brass, without foundation in reality or evidentiary support.

The contention of the majority of the Supreme Court that we must, in effect, virtually invariably defer to the expertise of the Armed Forces about the military necessity of uniforms, without any variation, however trivial, is entirely without foundation. The Supreme Court, of course, should give due deference to their views, but the Constitution governs, not dictates of our Armed Forces, unsupported by tenable and objective expert evidence.

With all respect, I regard the Supreme Court decision in the Yarmulke case to have caused an unnecessary and serious constitutional confrontation. The Court might well have said that since Captain Goldman wore his Yarmulke, without formal charges, for forty eight months, the complaint by a disgruntled military prosecutor should have been dismissed by the Colonel in charge, in the exercise of sound discretion and simple common sense. Commanding officers, virtually every day, overlook minor transgressions of military regulations.

[19] *Id.* at 1316.

[20] *Id.* at 1314.

In the alternative, the Court might well have said that other military regulations which permit a military commander to exercise his discretion to permit wearing of unobtrusive religious jewelry (crosses, stars of David and the like), to encompass the wearing of an unobtrusive Yarmulke, indoors.

Further, the commanding officer had the authority to permit Captain Goldman to wear civilian clothes, which he requested, and this too would have avoided a constitutional test, since the Rabbi would thus not have been out of uniform, in wearing his skull cap.

Also, there is no such thing as unobtrusive wearing of military jewelry. Soldiers are notably lax about concealing their crosses or stars of David, as we see in "M*A*S*H," and as I personally witnessed in World War II, without any affect on military discipline or morale.

Three concurring justices reluctantly acquiesced in the Court decision because they perceived a potential equal protection problem. They said that if Yarmulkes were permitted the same principle would have to cover Sikh turbans and beards and Rastafarian exotic hair styles.[21] Their fear is entirely unfounded. Sikh turbans and beards are scarcely unobtrusive. And the same is true of Rastafarian dreadlocks. But, even if they are deemed obtrusive the evidence is, as I have demonstrated, that their headgear in no way affects military discipline or morale. Further, both in the case of Sikhs and Rastafarians, there are other regulations of the military which are applicable, namely, those which govern obtrusive headgear and hair styles.[22] A Yarmulke can scarcely be regarded to be in this category. Further, upon inquiry I was advised that there are no Sikhs or Rastafarians in our volunteer armed services. It will be time to consider their complaint, if they choose to lodge one. The Court does not issue advisory opinions.

The Yarmulke case, in itself, does not seem, at first blush, important. But it is extremely so. The Supreme Court in this case seems to be insensitive to the reach of the Free Exercise Clause of the First Amendment, as it was to the application of the Establishment Clause in the Creche case.

Fidelity to the Free Exercise Clause of the First Amendment requires that the government keep its hands off of religion, its institution and practices. And, absent proof of military necessity, this constitutional principle applies to the United States Armed Forces. As Justice O'Connor said in dissent, ". . . the government's policy of uniformity must yield to the individual's assertions of free exercise of religion,"[23] unless the government presents clear and convincing proof that granting an exemption would do substantial harm to military discipline and esprit de corps. No such proof was offered by the government in the Yarmulke case.

[21] *Id.* at 1315 (Stevens, J., concurring).

[22] *Id.* at 1319 (Brennan, J., dissenting).

[23] *Id.* at 1326 (O'Conner, J., dissenting).

A military chaplain in World War II is reputed to have said: "There are no atheists in the foxholes."

The Supreme Court, in the Yarmulke case, seems to have added: "And no place for patriotic Orthodox Jews." Of course, their religious obligations would be satisfied by covering their heads with helmets, but if denied the right to wear Yarmulkes while indoors on duty, they would never reach foxholes because of their religious convictions.

In the United States volunteer armed services, Orthodox Jews can elect not to join. But, if conscription becomes necessary the problem is compounded.

As Justice Brennan, dissenting aptly observed: "The Court and the military services have presented Orthodox Jews with a painful dilemma — the choice between fulfilling a religious obligation and serving their country. Should the draft be reinstated, compulsion will replace choice."[24]

In two World Wars, the recruiting slogan of our allies and ourselves was: For God and Country. No longer. For minority believers, who must cover their heads while in military service, both indoors and outdoors, they must choose, under penalty of court martial, between God or Country.

[24] *Id.* 132 (Brennan, J., dissenting).