Legal and Moral Analyses of Educator's Obligations

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I commend Suzanne Rosenblith's exemplary article, *A Modest Proposal to Address Burden Shifting in Public Schools*, as it brings careful philosophical reasoning to bear on the timely issue of potential conflicts between (the exercise of) religious liberty and the public good of schooling in the United States context. That Rosenblith is able to so deftly navigate complex and deeply compelling elements of this longstanding dilemma with a balanced hand, never disregarding or unduly prioritizing either side of the conflict, sets a fine model for future work on this and similarly vexing issues of a pluralistic democratic society. In what follows, I hope to dwell in that good spirit of fair treatment while pushing Rosenblith's argument to a slightly more expansive yet, in some senses, simpler, proposal.

TYPES OF ANALYSES

Before doing so, I would like to separate what I detect as overlapping dimensions of attention in the problem as presented and so eloquently addressed by Rosenblith. In so doing, I aim to clarify some of the ways (presented as conceptually distinct though, perhaps, necessarily intertwined in practice) in which one might begin to engage the worry at the core of the essay.[1]

First, the positive legal question of the essay concerns precisely what the law currently obliges regarding accommodations of free exercise claims. Thus, when reflecting on public employees in schools, one might most wish to think of the existing legal precedents as tools to be marshaled in the service of appropriate outcomes.

Second, one might engage issues of jurisprudence regarding the, among other categories, normative foundations upon which the courts have arrived at past decisions and will do in the future. Thus, when reflecting on public employees in schools, one might readily study justifications for past arguments, critiquing

and correcting where there are shortcomings, and creating firm arguments in the service of appropriate outcomes.

Finally, one might engage the moral issues of obligation relevant to cases of public employees in schools. This set of concerns might be further divided into two subdivisions consisting of a) the general obligations of employment in a public capacity, and b) the more specific role obligations (independent of employment status) of the educator. Among other options, these concerns might regard the legal framing of claims of free exercise by public school employees as either 1) a useful context for determining obligations, 2) evidence of a relatively settled view of moral obligations, or 3) only incidentally related to moral obligations. While I take it to be the case that fascinating and productive work can be conducted on and across these dimensions, in what follows, I would like to focus attention on one area.

As Rosenblith has provided a fine overview of the legal cases and the opinions of the courts, I will take those facts as read and not engage them further. On the second category, concerned with normative questions of the underlying philosophy of law, I do wonder about some of Rosenblith's interpretations of legal arguments. For one (relatively minor) example, it seems to me that there are at least two ways in which the referenced cases might be using the term "burden." On the one hand it seems that "burden *shifting*" might be best applied to issues of the responsibility to prove that employment discrimination (on the basis of religion or any other protected identity category) has taken place; the burden of proof rests upon the plaintiff and, after that party makes a case, shifts to the defendant, and volleys back and forth as each side submits facts in their favor. On the other hand, the concept of "*substantial* burden," the threshold that is invoked in many of the relevant cases presented in the essay, points to the degree to which a party is harmed by an inability to enjoy free exercise given the constraints of their position. I take the distinction between the two usages of burden to be crucially important for normative analyses of the existing legal arguments and the Supreme Court's (majority and minority) opinions. That said, I wish to pursue an extension of Rosenblith's skillful argument that is friendly to both types of "burden" and does not primarily hinge upon other issues of

DOI: 10.47925/73.220

jurisprudence. I wish to focus upon the moral arguments that might be made (both in general cases of employment in a public capacity and the more specific role obligations of the educator) relative to the free exercise of religion and the practices of the educator.[2]

OUR MORAL OBLIGATIONS

In surveying the obligations that might counter a free exercise claim, one might consider the general obligations that exist for employees such that their religious commitments would be salient. Some jobs are essentially performances that run counter to the commitments of particular religious traditions. For example, many principles of Buddhism might be at odds with the essential work of the abattoir. As such, a person employed in such an environment, objecting to the activity of the job on religious grounds, may be interpreted as misunderstanding the indispensable business of the slaughterhouse.[3] One might have an obligation of employment, that is, an obligation to perform the task for which one is compensated, such that full participation in a particular religious tradition simply renders one unable to meet a particular set of obligations and, therefore, hold a particular job. It is quite possible that, in analysis of public employees in a school, we might do well to conceive of the essential activities of the position, such that some persons' objections of conscience render them unable to meet their employment obligations, and thus unable to perform their jobs.[4]

Relatedly, it may be the case that educators, in virtue of their status as educators, have a distinct and non-employment-based obligation to perform the essential activities of their position. Whether that position be understood as a contingent upon remuneration for one's efforts or is held in some less transactional sense (think of the volunteer educator, perhaps), it may be the case that being an educator entails an obligation to perform in a particular manner.

A ready analogy might be found in the case of doctors, who, according to the code of their profession, have a duty (especially in moments of medical emergency) to perform in particular ways that supersede compensation, pol-

itics, and other non-essential (to their efforts as doctors) circumstances.[5] The existence of a professional code of ethics, which guides dilemmas of the sort under discussion, does much to forward an understanding of the obligations that exist for a profession, often regardless of whether that professional capacity is engaged under conditions of employment.

Of course, a code of ethics does not end all discussion of the conflicts that arise in circumstances of free exercise claims. For example, the Code of Ethics of the National Association of Social Workers includes statements about how members of that profession ought to advocate on behalf of their clients, yet the profession has struggled with how (and, quite frankly, whether) to accommodate within their ranks persons who, due to their religious traditions, feel unable to perform particular actions (largely related to some Christian social workers degree of support relative to their homosexual clients).[6]

A study of the various professional codes of ethics for educators might give some (admittedly, non-legal) clarity regarding the essential obligations of the profession, such that persons with views in sufficient conflict with those obligations might not be able to secure accommodation, as accommodation would constitute erosion of the essential activities of the profession. In a sense, accommodation of this sort mistakes what public education is, at its core, *about*.

Perhaps this treatment might allow us to return to Rosenblith's statement that "public education is about the benefits to students and society at large … ." As such, we can return to the examples of Smith, Jones, and Davis, and ask which violates the essential obligations of the educator *as* educator. On my view of Rosenblith's very helpful arguments, we have good reason to believe that this focus on the obligations to students and society presents a moral landscape for theorists (and jurists) to further navigate.

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1 I do not take this typology to be exhaustive. It is simply meant to evidence one way of disentangling the issues of the central problem of the essay.

DOI: 10.47925/73.220

2 While I do think that the state's compelling interest might lend further weight to these moral arguments, I leave that legal justification aside in my comments.

3 I leave aside issues of employment as some sort of strategic activity of social demonstration or protest.

4 This seems to reflect public outcry regarding John Sullivan, a teacher at Campbell High School outside of Honolulu, on the occasion of his stated refusal to educate undocumented immigrants. While not arising from religious belief, the conflict of personal conscience and public employment obligations render this case relevant. Sullivan might be understood by the general public as failing to perform the essential activities of his position.

5 American Medical Association Code of Medical Ethics, June 2016, Section 1.1.7.

6 For example, see: Frederic G. Reamer, "Eye on Ethics: Wrestling With Faith in Social Work Education," *Social Work Today*, May 2013.