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Colorado's Indoor No-Smoking Law is Constitutional

SUMMARY: Colorado's Indoor Clean Air Act, which applies to restaurants and bars in the state, but not to casinos or a special smoking area at the Denver International Airport, does not violate the federal or state constitutions. The United States District Court for the District of Colorado decided *Coalition for Equal Rights v. Owens* on October 19, 2006.

BACKGROUND: In March 2006, the Colorado legislature passed the Colorado Clean Indoor Air Act, which prohibits smoking in most indoor areas, including places of employment. The act has only a few narrow exceptions. They include licensed casinos and a special area in the Denver International Airport, plus employers with fewer than three employees whose facilities are not open to the public.

A group of over 500 bars, bowling alleys, billiard clubs, restaurants, liquor stores, bingo halls and other businesses called the Coalition for Equal Rights sued the state, alleging that the no-smoking law violated their rights under the state and federal constitutions.

ANALYSIS: The due process and equal protection clauses ensure that laws are applied fairly and equally. Because the indoor no-smoking law exempted casinos and a special section of the Denver airport, plaintiffs alleged that it was irrational and that it violated their right to equal protection because the excepted premises were not meaningfully different from their own.

Laws by their nature distinguish between permissible and impermissible acts. Not every distinction is prohibited by the Constitution, nor must all people be treated equally regardless of circumstances. For example, legislatures can single out for punishment as burglars people who break into others' homes without permission and take another's possessions. Due process requires that laws be clear and not arbitrary or irrational. Equal protection requires that "similarly situated" people be treated similarly. Congress does not violate equal protection by making burglary a crime because criminals are not "similarly situated" to law abiding citizens.

When a person or entity challenges a law, the court will first consider the party making the challenge. First, according to the legal principle known as "standing," the challenger (plaintiff) must be someone directly harmed by the law. Another consideration is whether the challenger is a member of a group that has a history of persecution or mistreatment under the law. Courts look very closely at laws that disadvantage people on the basis of race or sex. To make such distinctions the government's purpose for the law must be strong and the government must show a close relationship between the law's purpose and its effect. A law preventing women from wearing blue pants could be challenged under due process and equal protection for being irrational and unfair and for treating women differently from men. But a law prohibiting young women from working in jobs that expose them to substances shown to cause birth defects might stand. Pants color has no significance for one sex over the other, but only women can become pregnant.

The United States Supreme Court has also identified certain "fundamental rights," such as the right to marry, to procreate, to travel and to vote. A legislature must have a very strong public purpose for a law infringing on these rights, and the law must be carefully written to serve that purpose without other unwanted effects.

The plaintiffs in this case were not in a strong position to challenge the law. Business owners and employers are not historically disadvantaged groups whom the courts need to guard with extra vigilance against discriminatory treatment. Likewise, smoking is not a fundamental right—an activity, like marriage or procreation, basic to our understanding of liberty in this country. Without some special status to bolster their claim that the law was unfair to them, the plaintiffs were left to bring their claim under the "rational basis" standard of review. This is a standard under which courts will allow a law to stand if there is just some rational basis for the law's existence.

Plaintiffs claimed that the law violated equal protection because it permitted smoking in licensed casinos and in the special spot at the airport, but not on their premises. They called this irrational because their businesses were not meaningfully different from casinos, particularly in the case of bingo halls. The state justified the casino exception on several grounds: casinos had only recently become legal in Colorado, many of the towns in which casinos are located are dependent on the revenues casinos generate, casinos face severe competition from Indian Reservation gaming; and Colorado derives direct economic benefit from its licensed casinos. Because the legislature need have only some rational basis for the distinction, the exception for casinos did not violate equal protection. The airport was a rational exception because many of the travelers who use it come from other places and may not even leave the airport during their brief stay in the state. It was not irrational to leave bingo halls within the statute because they do not generate the same level of revenue for their towns or the state that casinos do. Financial considerations are legitimate under the rational basis test.

Plaintiffs also alleged that the law violated substantive due process for three reasons: it imposed criminal liability on them for the acts of others--smokers; applied criminal penalties in a manner that was vague; and deprived plaintiffs of property in a manner not rationally related to the act's purpose. The court easily rejected the first claim. The law provided that "smoking shall not be permitted and no person shall smoke in an indoor area." Affected businesses were therefore liable for permitting others to smoke. It was not the act of the other (for which the smoker could be punished) but allowing the act that made the business liable. Their vagueness challenge was based on the exception for employers with less than three employees. The definition of "employee" included all sorts of persons who might do work on the site, such that very few employers would be exempt under the provision. The court acknowledged that the restriction was very narrow but that did not make it vague; the public could understand from reading it what was, and was not, covered. Finally, the court found no merit in

plaintiffs' claim that the no-smoking law impermissibly limited the ways in which they could use their property. Courts have long recognized government's power to create reasonable restrictions on property use. These include laws on noise, pollution, hazardous activities, employee conditions and wages, and many others. Because smoking is a known health hazard with significant societal costs, limiting it in public indoor locations was well within the legislature's power.

Plaintiffs also alleged that the clean indoor air act was impermissible "special legislation." The Colorado state constitution bans such legislation, which grants exclusive rights to any corporation, association or individual. It is a law against government favoritism, which the plaintiffs argued the clean air act bestowed on the excepted groups. But the standard for this challenge is also rational basis, so the court set it aside under the same reasoning it had applied to the equal protection challenge. The legislature had valid reasons for the exceptions in the statute.

EXCERPTS FROM THE COURT'S OPINION (By Judge Babcock): "When a challenged statute does not affect a protected class or involve a fundamental right, it will be overturned only if it is not 'rationally related to a legitimate state interest.' Social and economic legislation is presumed to be rational and this presumption 'can only be overcome by a clear showing of arbitrariness and irrationality.' The test for rationality review in equal protection cases is the same under the Colorado Constitution.

"Plaintiffs' efforts to create a higher rationality standard requiring a 'substantial' relationship between legislative means and ends is, quite simply, unavailing. The prevailing authority all supports the basic conclusion that legislatures have broad discretion to make economic and social distinctions in pursuit of valid public policy goals, and courts may strike such legislation only if the distinctions are irrational and completely unrelated to any conceivable policy goal.

"Plaintiffs also suggest that they are entitled to a different, more searching standard of rationality review because legislation aimed at unpopular groups, such as smokers, is subject to more serious scrutiny. This argument is unpersuasive. While the Supreme Court has stated that 'a bare. . . desire to harm a politically unpopular group' is insufficient to satisfy a rational basis test, it has never held that laws impacting politically weak or unpopular groups who are not suspect classes are subject to some different kind of rationality review. Moreover, even if I were to acknowledge that smokers are a weak and unpopular group..., the impacted group in this case is not smokers as a whole. Plaintiffs represent a coalition of owners of establishments who want to allow their patrons to smoke, and they challenge provisions of the Act exempting other kinds of establishments. [They] would have to present some evidence that the Government was animated by 'a bare desire to harm' restaurants and bars that allow smoking. Plaintiffs have provided no such evidence, and this argument necessarily fails."

COMMENTS & QUESTIONS

1. Who are the plaintiffs in this case?
2. Why are the plaintiffs challenging the no smoking law?
3. Why did the legislature pass the no smoking law that is the subject of this case?

Due process and equal protection are basic constitutional protections that are central to our free society. Due process has two components: substantive and procedural. The procedural component requires the government to enforce the laws with fair procedures, including notice of a violation and an opportunity to appear in court to offer a defense to the charge. Substantive due process requires that the law be fair in substance and not unduly vague or irrational. Equal protection requires that "similarly situated" people be treated similarly. The plaintiffs are challenging the Colorado no smoking law on both due process and equal protection grounds.

What undercut the plaintiffs' chances in this case was the standard of review the court applied. Where no fundamental rights are at issue and no "suspect" or historically disadvantaged class is involved, the courts will uphold a law that has some rational basis. This standard of review pays respect to our system's "separation of powers" structure. In general legal matters, the legislature has the right to make whatever laws it feels serve the public. As long as there's a rational basis for it, courts will not interfere. Had the law in this case prohibited only women or particular races from smoking, or applied the prohibition only to businesses owned by women or minorities, the court would have overturned the law because there would be no important government interest advanced by it. Under the standard the court applied, prohibiting indoor smoking at most indoor facilities except casinos and the airport advanced financial and practical considerations, which had some rational basis and were therefore acceptable.

One of the state's arguments for exempting casinos from the law was that the towns in which they were located relied on the revenue. The state also noted that casino gambling is a recent enterprise in Colorado. If you were the plaintiffs' lawyer, what might you argue from these two statements? Doesn't the state also generate revenue from taxes on bars and restaurants that allow smoking, just like it generates revenue from casinos? Doesn't this fact undercut the rationale for the different treatment under the law?

People have been smoking tobacco for hundreds of years and smokers grew accustomed to smoking almost anywhere they pleased. Why doesn't this make smoking a fundamental right? If the presence of smokers is essential to your business, should the government be allowed to drive off your customers by banning smoking? Does this violate due process or equal protection?

Should the state be passing laws banning smoking at all? Why shouldn't people be able to decide on their own whether to go to a bar or restaurant that allows smoking? Why should the state dictate this? Could the state ban smoking anywhere in the state? Could it outlaw the sale of cigarettes completely? It probably would not do this because of the tax revenue that cigarettes generate. Isn't the state being a bit hypocritical in not outlawing smoking altogether?

Why is it necessary for the state to pass laws to protect us?

Imagine that the Colorado legislature passes a ban on flip-flops in public places. It justifies the ban by saying that flip-flops hurt tourism by making the state look too unprofessional. Would this fly? What if the legislature banned them because it thought they were undignified? What if a study revealed that many people got hurt from falling in flip-flops, particularly on stairs? If the government found that mostly women wore flip-flops could it ban women only from wearing them?

Defamation on the Internet

SUMMARY: A woman who reposted another person's potentially defamatory comments on the internet was protected against a defamation claim by the federal Communications Decency Act. The California Supreme Court decided *Barrett v. Rosenthal* on November 20, 2006.

BACKGROUND: Drs. Stephen Barrett and Timothy Polevoy operate websites devoted to exposing fraudulent health care practices. Ilena Rosenthal directed a group called the Humantics Foundation for Women. Rosenthal regarded Barrett and Polevoy as reckless and overzealous in their pursuit of fraud. On her website, she reposted to the internet an article by Tim Bolen reporting that Polevoy stalked a Canadian radio producer who hosted a popular show on alternative medicine. The substance of this article was apparently untrue. The doctors sued, alleging that Rosenthal had committed libel through these postings. (In defamation law, "libel" is defamation through the written word; "slander' is defamation through the spoken word.)

Rosenthal moved to dismiss the case, arguing that her conduct was protected speech and that she was immune from suit under the federal Communications Decency Act. The California trial court granted Rosenthal's motion, but the Court of Appeals reversed. Rosenthal then appealed and the California Supreme Court granted review.

ANALYSIS: In the early 1990s, the internet began to grow rapidly in size and importance, creating a "wild" frontier type of atmosphere. In addition to many positive attributes, the internet is also a place where a person can say just about anything about anyone. Sometimes this information is false or even harmful to a person's reputation or good standing. Plaintiffs who believed they were hurt by internet communications started suing internet service providers (ISPs) over the controversial information. Internet companies asked Congress for help. They argued that they could not provide the beneficial public service of internet access if they could be held liable for the content of messages their thousands or millions of customers exchanged over their computers.

Congress sided with the ISPs and included a provision in the Communications Decency Act of 1996 exempting providers *and users* of interactive computer services from being treated as the "publisher" or "speaker"… "of any information provided by another information content provider." So, even though an individual spreading a false and damaging claim about someone else over the internet might be liable for damaging that person's reputation, an ISP that carried the false statement would not be liable. Congress felt the sheer volume of information traded on the internet made scrutinizing postings for false and damaging statements impractical and unreasonable. The legislature was also wary of an approach that would discourage use and growth of this medium and free speech.

Barrett tried to distinguish Rosenthal as a distributor of false information, as opposed to a publisher. Under his theory, Rosenthal should be held liable when she knowingly took a particular statement damaging to Barrett's reputation and reposted it elsewhere on the internet. While it was unreasonable to hold ISPs liable as "publishers" or "speakers" of the massive quantity of information that flowed through their computers, it was reasonable and fair to hold a distributor of information accountable because Rosenthal selected particular statements from cyberspace and reposted them. For that conduct, Barrett argued, Rosenthal should be treated the same as the person who initially created the allegedly false statements—the information content provider.

The Court of Appeals accepted this argument, but the California Supreme Court said no. For one thing the distributor argument did not respond to the other group protected by the CDA—"users" of interactive computer services. Barrett did not contest that Rosenthal was an internet user. Instead, he asked the court to distinguish between active and passive users. A passive user is someone who made no effort to determine whether reposted information was potentially harmful and would not be liable. But an active user, who reposted information knowing it was potentially harmful, should be liable just as if he or she were the creator of the message. The California Supreme Court acknowledged that individual users are in a much better position to control the information they use and share on the internet than ISPs because of the relative volumes involved. But Congress chose to include 'users' in its protection and showed no intention to split users into protected and potentially liable categories. Doing so, the court noted, would discourage people from carefully reviewing materials, even for the beneficial purpose of removing slanderous or false statements, because close scrutiny could expose them to liability. Barrett's position would disserve the public by discouraging the robust exchange of ideas and efforts to review reposted materials for potentially harmful statements.

Concluding that Congress had not intended to leave distributors out of the immunity from suit that it created for providers and users of internet content, nor to create a special class of liable "active" users, the California Supreme Court reversed the Court of Appeals and dismissed the suit against Rosenthal.

One judge concurred in the majority opinion, but distinguished the situation where the creator of defamatory information engages in a conspiracy with a user to have the user spread the harmful information on the internet. In that situation, the distinction between content provider (or speaker) and user is a sham and the provider cannot escape a defamation claim by attempting to hide behind the user, nor the user by claiming protection under the statute.

EXCERPTS FROM THE COURT'S OPINION (By Justice Corrigan): "We note that it is far from clear how the distinction between traditional print publishers and distributors would apply in the Internet environment, with its many and various forms of discourse. As the [Supreme Court] noted, any person or organization with a computer connected to the Internet can 'publish' information. Whenever such information is copied from another source, its publication might also be described as a 'distribution.' The distinction proposed by the Court of Appeal, based on rules developed in the post-Gutenberg, pre-cyberspace world, would foster disputes over which category the defendant should occupy. The common law of defamation would provide little guidance.

"In this case, for example, Rosenthal could claim that her active role in selecting and posting material disparaging plaintiffs qualified her as a primary publisher. Her participation in the dissemination of the Bolen article, particularly considered in light of her other alleged verbal attacks on plaintiffs, arguably went beyond mere distribution. The Court of Appeal provided no analysis justifying its conclusion that Rosenthal could be held liable as a 'distributor,' noting only that she alleged no facts preventing her from being so characterized. We need not decide the question, but certainly the argument could be made that plaintiffs' allegations cast Rosenthal

in the role of a 'publisher.'...

"Polevoy urges us to distinguish between 'active' and 'passive' Internet use, and to restrict the statutory term 'user' to those who engage in passive use.... Polevoy reasons that the term 'user' must be construed to refer only to those who receive offensive information, and those who screen and remove such information from an Internet site. He argues that those who actively post or republish information on the Internet are 'information content providers' unprotected by the statutory immunity. 'Information content provider' is defined as 'any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. . . .'

"Polevoy's view fails to account for the statutory provision at the center of our inquiry: the prohibition in section 230(c)(1) against treating any 'user' as 'the publisher or speaker of any information provided by another information content provider.' A user who merely receives information on a computer without making it available to anyone else would be neither a 'publisher' nor a 'speaker.' Congress obviously had a broader meaning in mind. Nor is it clear how a user who removes a posting may be deemed 'passive' while one who merely allows a posting to remain online is 'active.' Furthermore, Congress plainly did not intend to deprive all 'information content providers' of immunity, because the reference to 'another' such provider in section 230(c)(1) presumes that the immunized publisher or speaker is also an information content provider....

"As Rosenthal points out, the congressional purpose of fostering free speech on the Internet supports the extension of section 230 immunity to active individual 'users.' It is they who provide much of the 'diversity of political discourse,' the pursuit of 'opportunities for cultural development,' and the exploration of 'myriad avenues for intellectual activity' that the statute was meant to protect. The approach [urged by the doctors] would tend to chill the free exercise of Internet expression, and could frustrate the goal of providing an incentive for self-regulation. A user who removed some offensive content might face liability for 'actively selecting' the remaining material. Users in this position, no less than the service providers, would be motivated to delete marginally offensive material, restricting the scope of online discussion. Some users, at least those like Rosenthal who engage in high-volume Internet posting, might be discouraged from screening third party content. Although individual users may face the threat of liability less frequently than institutional service providers, their lack of comparable financial and legal resources makes that threat no less intimidating."

COMMENTS & QUESTIONS

1. What do Barrett and Polevoy do on the internet?
2. What kind of website does Rosenthal have?
3. Describe the dispute between the two parties.

Defamation is a statement made to one or more people that injures another's reputation. The statement must go further than being insulting or mean; to be defamatory it must harm the person's standing in the community. Famous people, or "public figures," have less protection against defamation than anonymous members of the public on the theory that the famous have chosen to become subjects of public scrutiny and discussion and can expect that some of the things people say will be critical—even harshly so. The doctors in this case alleged that Rosenthal defamed them by reposting to various websites an article accusing one of the doctors of stalking a Canadian radio producer.

The plaintiffs alleged that by taking someone else's harmful statement and repeating it, Rosenthal should be held liable just as if she were the initial communicator. Rosenthal argued that she was protected by the Communications Decency Act. The plaintiffs tried to distinguish her as a "distributor" or an "active use." However, the court was concerned over putting reins on the internet. In the Communications Decency Act, Congress had clearly taken the course that insulated those who post information by others from liability, rather than imposing upon them the need to scrutinize information they share for potential harm. This approach may result in some harm, but Congress felt that this harm was acceptable in light of the internet's vast power and reach.

Because the First Amendment's freedom of speech guarantee is among the most cherished rights in this country, Congress and the courts are very reluctant to "chill" speech by making it easy for people to break the law through their communications. The time-honored remedy to speech-related controversies has always been more speech—getting one's own view out to the public—rather than less speech. Recognizing the internet's enormous potential in areas such as communication, research, politics, commerce, and entertainment, Congress chose to limit rather than expand liability for contested speech.

Do you think that Congress was correct in limiting the law of defamation on the internet as they have? How is the internet different from a newspaper? If the New York Times republished what it knew to be a defamatory article from another publication, it could be liable for defamation. So, why isn't a republisher on the internet liable in the same fashion? Isn't the internet a dangerous place when it comes to trying to maintain one's reputation? Once something first

Appears on the internet, there really is no stopping it. If someone posted a defamatory remark about you on the internet, should everyone be able to republish it over and over without any repercussions?

Rumors are well traveled stories about individuals that are sometimes unflattering or false. If you know a rumor to be false, yet you repeat it in our daily three-dimensional lives, you can be liable for slander. Shouldn't you be held to the same standard on the internet? How do you ever stop a rumor without enforcement of defamation laws. Is it impossible to stop rumors on the internet?

Did Rosenthal spread a rumor or was her behavior something different? If the plaintiffs could show that she intentionally republished the article, knowing it to be false, don't you think she should be liable?

Should people be allowed to say whatever they want on the internet? Can they (without any fear of legal repercussions)? Would there be anything beneficial in making Rosenthal liable in this case? Do you think that holding Rosenthal liable in this case would "chill" free speech on the internet? What would be the harm in holding her liable in this case?

OK to Require Drug Plans to Cover Contraceptives

SUMMARY: A New York law requiring employers who provide drug coverage for their employees to cover prescriptions for contraception did not violate an employer's religious freedom, even though it exempted some other employers with religious affiliations. The New York Court of Appeals decided *Catholic Charities of the Diocese of Albany v. Serio* on October 19, 2006.

BACKGROUND: In 2002 the New York state legislature enacted the Women's Health and Wellness Act (WHWA), which mandated that employer health care coverage include a number of services important to women's health. In deliberating the new law, legislators reviewed evidence showing that women in the state paid 68 percent more in out-of-pocket health expenses than men and that most of that disparity arose from reproductive health services. Evidence also suggested that women with unintended pregnancies often delayed prenatal care; various health problems such as diabetes, hypertension, arthritis and coronary artery disease can be aggravated by pregnancy; children born from an unwanted pregnancy are at risk of low birth weight and developmental problems; and that half of the nation's roughly 3 million unintended pregnancies each year end in abortion.

This evidence convinced the legislature that women were unfairly burdened by health care costs men do not incur, and that women's health in the state could be improved with better reproductive care. The WHWA therefore requires employers who provide insurance coverage for prescription drugs to include contraceptive medications in those plans.

The act does not apply to "religious employers." A religious employer as defined under the WHWA exists for the purpose of inculcating religious values; it primarily employs people of the same religious beliefs; it primarily serves persons with the same religious beliefs; and it is a non-profit organization under the federal tax code.

Ten social service organizations with religious affiliations sued the superintendent of insurance (the state official who enforces the new law). The plaintiffs argued that it violated their religious freedom under the First Amendment and the New York constitution because it required them to provide something contrary to their beliefs. The trial court and appeals court rejected the plaintiffs' claim and they appealed to the state supreme court (called the Court of Appeals in New York).

ANALYSIS: The plaintiffs in this case did not meet the WHWA's definition of "religious employer." Although affiliated with churches, these social service organizations were primarily engaged in helping the public, not in inculcating religious values. Many of their employees were not of their employers' faith. Likewise, many of the people served by these organizations had different or no religious beliefs.

While many of the people they employed or served had other beliefs, these organizations were operated by churches that opposed contraception. They argued that the WHWA contraception provisions violated the federal Constitution's religion clauses as well as the New York state constitution.

The First Amendment protects the free exercise of religion and prohibits the establishment of religion. Under the first protection, people in this country are free to practice whatever faith they wish to, or no faith. Under the second, the government is prohibited from establishing an official religion, and from preferring any one faith over another. Plaintiffs argued that the WHWA violated both of these provisions. It violated their free exercise rights by requiring them to do something they disagreed with—paying for contraceptive prescriptions as part of any drug plan they provided. They also argued that it violated the Establishment Clause because the law favored the beliefs of churches that sanctioned contraception over those that condemned it.

Although religious beliefs are protected by the Constitution, the faithful are not above the law. In a landmark case from 1990, the U.S. Supreme Court held that the criminal prohibition against peyote, a hallucinogenic drug, overrode a free exercise claim to the right to use the drug as part of certain Native American spiritual practices. The Court ruled that generally applicable laws created for public benefit, and not for the purpose of oppressing a particular faith, were enforceable against all people even when they conflicted with religious views. The New York Court concluded that this holding, from the nation's highest court, forced its hand in this case: the WHWA was a generally applicable law created to benefit women's health and right an inequality in their health care costs compared to men's. It was not created to oppress a particular faith.

The New York court was not troubled by the religious employers exception. It excluded employers whose primary purpose, function and employees were devoted to the faith. Requiring them to provide contraceptive prescriptions would violate their rights because of their central religious focus. Here, many of the people working for and served by the plaintiff organizations were not of the employer's faith. The overall impact on the religious views of those covered by the law was therefore reduced.

States cannot provide their citizens with less protection than the U.S. Constitution grants, but they can provide greater rights. The New York Court of Appeals has held that when the state imposes an incidental burden on free exercise, courts must consider the state's interest served by the law and determine whether the burden on religion it creates is justified. Yet the court had never determined how much deference to show the legislature when evaluating such a claim. With this case, the court established that standard, ruling that courts examining a law with an incidental (rather than deliberate) burden on religion must give the legislature "substantial deference." Under the new standard, it is the plaintiff's burden to show that the challenged law unreasonably interferes with religious freedom. Here, plaintiffs could not show that the health insurance provision at issue was an unreasonable interference because the organizations' purpose, employees and services were not devoted primarily to the employers' religious views.

The court also rejected the Establishment Clause argument. The legislature reviewed and cited various sources showing that the law would advance women's health and create greater equality between women and men in the costs they paid for health care. Plaintiffs offered no evidence to suggest that the purpose of the WHWA was to oppress plaintiffs' religious views or to elevate some religious views over others.

EXCERPTS FROM THE COURT'S OPINION (By Judge Smith): "The burden on plaintiffs' religious exercise is the incidental result of a 'neutral law of general applicability,' one requiring health insurance policies that include coverage for prescription drugs to include coverage for contraception. A 'neutral' law, the Supreme Court has explained, is one that does not 'target religious beliefs as such' or have as its 'object . . . to infringe upon or restrict practices because of their religious motivation.' Religious beliefs were not the 'target' of the WHWA, and it was plainly not that law's 'object' to

interfere with plaintiffs' or anyone's exercise of religion. Its object was to make broader health insurance coverage available to women and, by that means, both to improve women's health and to eliminate disparities between men and women in the cost of health care.

"The fact that some religious organizations—in general, churches and religious orders that limit their activities to inculcating religious values in people of their own faith—are exempt from the WHWA's provisions on contraception does not, as plaintiffs claim, demonstrate that these provisions are not 'neutral.' The neutral purpose of the challenged portions of the WHWA—to make contraceptive coverage broadly available to New York women—is not altered because the Legislature chose to exempt some religious institutions and not others. To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion.

"It is also important, in our view, that many of plaintiffs' employees do not share their religious beliefs. (Most of the plaintiffs allege that they hire many people of other faiths; no plaintiff has presented evidence that it does not do so.) The employment relationship is a frequent subject of legislation, and when a religious organization chooses to hire non-believers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit. This would be a more difficult case if plaintiffs had chosen to hire only people who share their belief in the sinfulness of contraception.

"Plaintiffs contend that the legislation is invalid... because it distinguishes between religious organizations that are exempt from the contraception requirements and those that are not. But this kind of distinction -- not between denominations, but between religious organizations based on the nature of their activities -- is not what [the Supreme Court has condemned]. Plaintiffs' theory would call into question any limitations placed by the Legislature on the scope of any religious exemption -- and thus would discourage the Legislature from creating any such exemptions at all. But, as we pointed out above, legislative accommodation to religious believers is a longstanding practice completely consistent with First Amendment principles. A legislative decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause.

COMMENTS & QUESTIONS

1. What is the WHWA?
2. Why did the NY legislature pass it?
3. Does it require all employers to provide contraceptive prescription coverage to their employees?
4. Describe the type of business that Catholic Charities conducted?

The U.S. Constitution's freedom of religion provision has two distinct clauses - the Free Exercise clause and the Establishment clause. The Free Exercise and Establishment Clauses are both designed to protect the people from government interference in their religious beliefs. The right to free exercise of religion protects the people's right to practice their faiths in the manner in which they see fit, as long as those practices do not violate other laws. The Establishment Clause is a rejection of the English system of government to the extent that it incorporates the Church of England as an "official" national faith. The Founders believed that such a government provides religious leaders too much influence in the political sphere. The Supreme Court has interpreted the Establishment Clause not only to ban creation of an official US church, but also to prohibit Congress from favoring one faith over another.

Plaintiffs in this case argued that the Women's Health and Welfare Act violated both clauses. They argued that forcing faiths that reject contraception as sinful to pay for contraceptive prescriptions violated the free exercise clause. They also argued that the law elevated churches that accept contraception over those that reject it. If the legislature's purpose had been to force on plaintiffs what it saw as a "correct view" of sexual health and practices, the court would have struck down the statute. Likewise, had the legislature intended to promote one faith, favoring contraception, over those opposing it, the court would have found an Establishment Clause violation. However, plaintiffs had no evidence for either position, and the state put into evidence the reports and studies it relied on in passing the act. Because the state had substantial support for its position, and plaintiffs had only their arguments but no hard evidence, the court upheld the law.

Do you think the WHWA forces religiously affiliated employers who do not support contraception to do something against their beliefs? Does it force plaintiffs to do something they oppose? Why doesn't this violate the Free Exercise Clause? Is the government interfering with plaintiffs' free exercise of religion?

The act does exempt some religious institutions from the coverage of the law. Isn't this case just a situation where the Catholic Charities does not fit the requisite definition to be exempt? Is Catholic Charities really a religious institution? If a nursing home run by the Catholic church, which opposes contraception, employed only Catholic workers, would applying the WHWA to it be unconstitutional? What if all the patients were also devout Catholics? What would Catholic Charities have to do to fit the definition of an exempt religious institution?

If a church opposed all war, would it be a violation of religious freedom to require their members to pay taxes to support the nation's military?

Finally, shouldn't employers be free to fashion the benefit programs that they provide to their employees without interference from the state? If employees did not like the benefits program, they could just work somewhere else, couldn't they?

Conviction Set Aside for Enron's Ken Lay

SUMMARY: Ken Lay was convicted of fraud in the Enron scandal. However, he died before he was sentenced and before he could pursue an appeal. As a result, his conviction and his victims' right to restitution, abated and was treated as though it never occurred. The United States District Court for the Southern District of Texas decided *United States v. Lay* on October 17, 2006.

BACKGROUND: Ken Lay was a top executive at the Enron energy corporation, a huge Texas company with billions in annual revenues. Early in the 21st century, however, newspapers began to report that the company's amazing performance was a fiction and that the enormous profits reflected on its books were the result of an elaborate accounting fraud. As a result, thousands of people lost their jobs and many investors lost their life savings. Civil suits by defrauded investors followed, as did criminal prosecutions.

After a sixteen week trial, Lay was convicted on May 25, 2006, of ten counts of conspiracy and fraud. On July 5, 2006, before he was sentenced, Lay died of a heart attack. Following his death, his estate filed a motion to vacate his conviction and dismiss the criminal indictment. Russell Butler, who alleged he suffered monetary losses because of Lay's fraud, filed a motion for restitution. Granting this motion would have required his estate to compensate the victims of the fraud. The United States opposed Lay's estate's motion, arguing that abating the conviction and restitution claim would unjustly enrich Lay's estate with criminal proceeds. It also urged the court to delay its decision because Congress was considering a legislative proposal on abatement.

ANALYSIS: In 1971, the Supreme Court held that when a criminal defendant dies before a pending appeal can be heard, the death "abates not only the appeal but also all proceedings had in the prosecution from its inception." The Latin phrase for this principle is *"abatement ab initio."* If this rule seemed perfectly clear, the Court muddled it several years later when it dismissed a petition for certiorari because the petitioner died. The Court said in that opinion that to the extent the earlier case was inconsistent, it was overruled.

Without more guidance, the Fifth Circuit—the federal appellate jurisdiction in which Texas lies—concluded that the Court's later proclamation applied only to petitions for certiorari, which are discretionary appeals, not to appeals of right. Before that case, the Fifth Circuit had two ways of treating restitution orders (trial court orders requiring a criminal defendant to compensate his or her victims). If the appeals court concluded that the trial court's purpose in making the restitution order was to punish the defendant, it would abate the order along with the conviction. If it concluded that the order's purpose was compensatory, it would allow the order to survive the defendant's death and be enforceable against the estate.

The Fifth Circuit reexamined its approach to abatement after the Supreme Court issued its second opinion. It considered the purposes behind abatement and identified two guiding principles. Under the *finality principle*, a defendant should not be considered guilty until he has had a chance to appeal the trial court's decision. The *punishment principle* holds that government should not punish someone who is dead or that person's estate.

The Fifth Circuit preferred the reasoning behind the finality principle, but that concept did not address the circuit court's prior approach of treating punitive and compensatory restitution orders differently. The court therefore abandoned its prior approach and held that regardless of its purpose, restitution orders could not survive a defendant's death because upon death the conviction—upon which any restitution order is based—abates and is no more. With no foundational conviction, there can be no restitution order. Although the court conceded that this approach hurts the interests of the defendant's victims, the finality principle outweighs their arguments. Any sense of guilt and obligation to victims attaching to a defendant turns on his conviction being upheld; without the opportunity to follow through on his appeal, the defendant is deprived of the chance to beat the conviction and redeem himself, eliminating the societal debt a guilty verdict would have left.

Because the restitution statutes turn on a conviction, and *abatement ab initio* removes the conviction and prosecution as they never existed, they do not contemplate ordering restitution where the defendant dies before his appeal is heard. The district judge noted that alleged victims of Lay's fraud could still pursue civil claims against his estate for their losses. All this case determined was that restitution as ordered by a judge in this criminal case was inconsistent with abatement principles. Had Lay lived, and lost on appeal, restitution may well have been ordered. Since Lay died without the chance for an appellate court to hear his asserted errors at trial, the judge determined that his conviction abated and there was therefore no basis on which to award restitution.

EXCERPTS FROM THE COURT'S OPINION (By Judge Lake): "The Fifth Circuit explained that [u]nder the finality rationale, we have described the entitlement to one appeal as follows: [W]hen an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the *interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal,* which is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence.'

"[A]batement of the criminal proceeding does not necessarily mean that an individual who suffered a loss cannot obtain reimbursement in *civil* court. If he can meet the civil court's lower burden of proof, he may receive a judgment from that court. The criminal court that entered the prior reimbursement order, however, should not retain any power over that prior defendant.

"One may argue that allowing the estate to substitute for the dead defendant ensures the fair representation of the decedent's interests, but such a substitution does not align logically with the abatement of all prior criminal proceedings. Essentially, the substitution doctrine forces the estate to argue about a conviction that no longer exists and requires a court to adjudicate the merits of a proceeding that no longer took place. Although it is not without a cost, requiring victims to argue their case in civil court protects the interests of defendants whose direct appeals are not yet final."

COMMENTS & QUESTIONS

1. Who was Ken Lay?
2. What did he do wrong?
3. Was he convicted of a crime?
4. Who was Russell Butler and why was he interested in this case?

Under our system of government, criminal defendants are innocent until proven guilty. That finding of guilt must come through a criminal trial, where the defendant is permitted to offer a defense and present evidence and witnesses. Lay had a trial, where he was found guilty of 10 fraud counts. But before he could be sentenced, or file an appeal, he died. His estate therefore asked that the case against him be vacated. Butler was an investor in Enron and claimed to have been defrauded by Lay. He opposed the estate's attempt to set aside the conviction and asked the court to grant him restitution for his losses. The government sided with Butler, arguing that vacating the conviction would "unjustly enrich" Lay's estate with ill-gotten gains from his criminal conduct.

The court felt bound by Fifth Circuit precedent holding that convictions should be abated *ab initio* when the defendant dies before his appeal can be heard. Because abatement completely eliminates the conviction, it removes the basis for any restitution and treats the criminal proceedings as though they never existed. Do you think that this is the appropriate approach that should be taken in this case? Why should a conviction disappear when a defendant dies? Why should the defendant get the benefit if he has already been convicted? So what if he hasn't had the chance to appeal?

Butler argued that the estate should stand in for Lay in his appeal and the proceedings should continue. The court disagreed. Since the estate was not the defendant, the court felt It was not fully suited to offer a complete defense. Do you agree with this approach?

The reason Butler wanted the conviction to stand was so that he and other defrauded investors would have a basis for a restitution order to recover some of their losses. The court was quite clear that the result in this case did not deprive Butler and other investors of recovery. It merely eliminated the criminal conviction as a basis for that recovery. Butler and the others could still bring a separate civil action against the estate to recover there losses. If you disagree with the Court's holding, does this make you feel any better because the investors have not lost out completely? However, civil cases like this can be very expensive. Why should the victims have to bring another suit?

To win a criminal conviction, the prosecution must prove the defendant is guilty "beyond a reasonable doubt." This is much more difficult than meeting a civil trial's "preponderance of the evidence" standard, in which the plaintiff must merely show that his version of events is more likely than the defendant's. Therefore it should be easier for Butler to win in a civil setting.

Most criminal appeals fail. Given how hard it is to win a conviction, and to get one overturned, does the abatement rule make sense? Does abatement presume the defendant would win on appeal? Does abatement mean "innocent even though proven guilty?"

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