God’s ACLU’ Seeks Freedom for the Faithful

The Becket Fund’s head on why religious liberty extends beyond church—and why the ‘Slants’ case helps believers.

Opinion | The Weekend Interview

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Close your eyes and try to picture an activist for religious liberty. Maybe you imagine a noisily assertive Baptist, a beleaguered but intransigent Catholic nun, a militant rabbi or imam, or even a peyote-ingesting Native American. You’d be unlikely, I wager, to think of an amiable 30-year-old Mexican-American woman, who sees herself as a defender of all religion, on the front lines of America’s culture wars.

Montse Alvarado is the executive director of the Becket Fund for Religious Liberty, a Washington-based nonprofit law firm. It’s named for Thomas Becket, the archbishop of Canterbury who was assassinated in 1170 for refusing to let the church in England do the bidding of King Henry II.

Advocates for religious liberty in America are part of what might be seen as the second wave of rights activism in the courts, the first being the wave that began in the 1950s and ’60s with litigation over the rights of minorities, women and criminal suspects, among others. In the past 25 years, conservative and libertarian groups have applied lessons that the liberal vanguard learned about how to select test cases for litigation as a way to steer the law. The focus today is still on the individual, but on his right to own guns, send his children to the school of his choice, or—Ms. Alvarado’s field of concern—worship freely and live a full religious life uncramped by the state.

“Our first case at Becket was in 1996,” Ms. Alvarado says. “A boy name Zachary Hood wanted to bring a ‘Beginner’s Bible’ to his first-grade class on share-your-favorite-story day. His teacher said, ‘No, you don’t get to do that.’ ” The family sued the school board but lost the case, and the Supreme Court declined to hear their appeal. But the board eventually settled in a related matter—having to do with a Thanksgiving poster the 6-year-old had drawn saying he was thankful for Jesus—and the federal Education Department issued official guidance shortly thereafter, affirming a student’s right to express religious beliefs in all schoolwork.

This past year’s Supreme Court term included a landmark decision in support of religious liberty, Trinity Lutheran Church v. Comer. The justices ruled that Missouri could not turn down a church’s application for a public grant to resurface its
Missouri had asserted its authority to deny the grant by citing its state constitution, which includes a “Blaine amendment”—a provision 38 states adopted in the late 19th century to prohibit public funding of religious institutions. The *Trinity Lutheran* ruling “is not the end of Blaine, as many people like to say,” explains Ms. Alvarado. “There’s still a lot of work to be done there, but we’re very positive about it.”

The history of the Blaine amendments—named for James Blaine of Maine, who introduced a similar measure in the U.S. House in 1875—reveals they were intended to discriminate. “You’re looking at anti-Catholic laws, based on the sentiment of the majority of the population at the time,” Ms. Alvarado says. “Why we still have them today knowing their history,” she says, “I really don’t understand.”

Although the Blaine amendment isn’t yet dead, Ms. Alvarado sees the 7-2 ruling in *Trinity Lutheran* as “a great win, a landslide win. For religious liberty, it’s huge. But if you think about what it does for parental choice, and associational rights, it’s also very powerful.” The day after the justices decided *Trinity Lutheran*, they sent two other Blaine amendment cases back to state courts for reconsideration.

“There were other cases in the court’s last term that were a little quieter on religious liberties, but just as important,” Ms. Alvarado says. She refers, somewhat improbably, to *Matal v. Tam*, popularly known as the “Slants” case, after the Asian-American musicians who asserted the right to trademark an ethnic slur as the name of their rock band. The 8-0 ruling permits citizens to register terms that are “disparaging.” It regards any government attempt to prohibit such expression, however offensive it may be, as a straightforward violation of the First Amendment’s free-speech protection.

“It’s also a religious liberties case,” says Ms. Alvarado, whose organization filed a friend-of-the-court brief. I ask her to elaborate on what seems a novel analysis. “Oh,” she exclaims, as if she’s been asked to explain something much too obvious, “because any time the government can limit speech for one side or another, you’re in trouble. In ‘Slants,’ they said you can’t say your name is something because it’s disparaging to a specific group. Well, anything that I say as a Christian or a Jew could be disparaging to someone else. Individuals want to say things from the pulpit about any kind of cultural issue, like abortion or same-sex marriage. If they don’t have the right to express themselves on moral issues, you’re limiting freedom of religion to a freedom of worship alone.”
Ms. Alvarado’s point goes to the heart of the different ways in which religious liberty is perceived in America. The progressive or liberal approach is to equate free exercise of religion with the freedom to *worship* and to deny that it has anything to do with how a person organizes his life. The Becket Fund and others assert that most religions have complete codes governing not only worship but other aspects of conduct. This comprehensive Way of Life—which leads a devoutly Christian baker to decline to decorate a cake for a same-sex wedding, for instance—commands much more from believers than progressives will allow.

This thrust of *Matal v. Tam* would seem relevant to a case on the Supreme Court’s menu for the coming term, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. The justices will decide whether Colorado’s attempts to compel a patissier to make a cake for a same-sex wedding, in contravention of his religious beliefs, violates his free-speech or free-exercise rights under the First Amendment. Ms. Alvarado believes the state’s position is logically untenable. Colorado is “arguing that baking a cake is not expressive,” and therefore not protected speech. “But at the same time, not baking a cake is obviously an expression. Is it one or the other?”

Ms. Alvarado is optimistic about the case, in which Becket plans to file a brief. “Speech right now has been very, very protected by the court in the past four terms,” she says. “They seem to have an understanding of the importance of speech for individuals, for institutions. That’s an opening where you want to follow through as much as you can to expand rights.”

Yet in *Masterpiece Cakeshop* the American Civil Liberties Union is doggedly on the side of the state. Why is the left hostile to religious liberty? “It’s fundamentally a misunderstanding of the role of religion,” Ms. Alvarado says. “Besides, the only way to expand government is to edge yourself into all aspects of an individual’s life, starting with how they can and cannot participate in the market.” She also cites *Burwell v. Hobby Lobby*, the 2014 case in which the high court held that the craft store’s owners, who object on religious grounds to certain types of contraceptives, could not be forced to provide them to employees.

“The ACLU has a sadly checkered record on religious liberty,” Ms. Alvarado says. “It’s sometimes with us, and sometimes against, but the moment that a lot of the sexual-morality issues came into play, it seems they lost the live-and-let-live philosophy that was so fundamental to them.” The ACLU, she says, supports religious liberty only for the groups it likes. “It’s an all-too-common error that undermines the First Amendment standard of equal protection for all religions.” This broader view is why legal scholar Viet Dinh has described the Becket Fund as “God’s ACLU.”

On the whole, Ms. Alvarado is buoyant “without being complacent” about the future of religious liberty in the U.S. The end of the Obama administration, she believes, should bring some respite to the faithful. “His administration was definitely hostile to conscience rights,” she says. “If you look at a lot of the writings his administration put out, you’ll see they were really focused on worship, the importance of being able to
practice within the four walls of a church. But they were hostile to religious speech, hostile to religious exercise, anything within the workplace. They’d say, ‘You shouldn’t have this job. You’re a second-class citizen if you’re unwilling to perform same-sex marriage services, or to accept the contraceptive mandate, or hand out these drugs. That makes you unfit for a specific position in the market.’”

Ms. Alvarado describes this kind of hard line on religious exercise as “unprecedented, unlike anything we’d seen before in our country.” While not all American presidents have great track records on religious liberty, the others in her lifetime do. “Bill Clinton, obviously, was the one who signed the Religious Freedom Restoration Act into law, so he gets a gold star,” she says. (RFRA was the law under which Hobby Lobby prevailed in 2014.) “George W. Bush gets a gold star as well. He did a lot of great work to make sure religious communities had expressive rights.” The Obama administration, by contrast, authorized “direct, government-enforced action, and a wielding of the force of the state against conscience.”

One of the Becket Fund’s best-known victories was a case that originated under Mr. Bush’s presidency and was resolved during Mr. Obama’s. Pastor Robert Soto, the Native American head of the McAllen Grace Brethren Church in Texas, asserts the right to use eagle feathers in his syncretic religious services. In 2006 undercover agents attended and confiscated the feathers under the Eagle Protection Act. As Ms. Alvarado lays out the facts, she is as close to apoplectic as it’s possible for a woman of her poise to be: “I mean, the Wildlife Service going after people’s eagle feathers that you can find on the ground, and you can be jailed when you want to use them to practice your religion! Isn’t that a little heavy-handed?” The case dragged on until June 2016, when a settlement allowed the church to keep its feathers.

Does the Trump administration offer better prospects for religious freedom? Ms. Alvarado pauses before answering: “This administration isn’t necessarily one way or another on these issues. But Trump’s campaign promises were awesome.” She cites an executive order President Trump issued that should protect the Little Sisters of the Poor, an order of Catholic nuns, from the ObamaCare contraceptive mandate. But she also says the Justice Department has yet to “work out the kinks” in the matter. The Little Sisters’ predicament was litigated all the way up the judicial chain, until a presumably divided Supreme Court kicked it back to the lower courts in 2016.

A cursory search of the subject on the internet reveals a great deal of consternation on the political right over the lack of legal relief for the Little Sisters, largely as a result of the chronic dysfunction in the Trump Justice Department. Even so, Ms. Alvarado is hopeful about the new administration. “The way they talk about religion is as religious liberty, not as freedom of worship,” she says. “They’re not limiting the right. For religious freedom, you’re looking at the robust version.”

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