periodical on the law of eminent domain.

GAYLE HIGHLAND

cases, over justice as well.

Paying the Piper Who Protects Our Freedoms

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

THE RECENT controversy over Denver Nuggets basketball guard Mahmoud Abdul-Rauf's refusal to stand for the national anthem—in violation of National Basketball Association contractual requirements—is a reminder of our never-ending national struggle to lay down reasonable boundaries between individual and community. We claim dedication to individual liberty but, confronted with a refusal to profess loyalty to principle or symbol, we often react with intolerance.

The controversy surrounding Abdul-Rauf, a Muslim whose religious faith provided a basis for his refusal to stand, came to public attention when he was suspended indefinitely without pay. He ultimately backed down, agreeing to stand and pray while others pledged.

The tension between the right to follow one's conscience and society's expectations of loyalty and respect for norms and symbols is not new. It has a long and checkered history, manifested in the difficulties the Supreme Court has had in attempting to craft a consistent First Amendment approach.

Although governments are more restricted than private parties in exacting professions of loyalty and belief, as recently as 1940 Justice Felix Frankfurter wrote, in *Minersville School District v. Gobitis*, 60 S. Ct. 1010 (1940), that religious freedom did not include the right to be exempt from generally applicable laws—in that case, the mandatory flag salute. With the outbreak of war in Europe, the Gobitis children—Jehovah's Witnesses who were summarily expelled from school for following religious conscience—were of little moment for eight of the nine justices. Not surprisingly, six days after the decision, a mob burned down a Jehovah's Witness church in Kennebunkport, Maine.

The tide turned in 1943, when Justice Robert H. Jackson, writing for the court in *West Virginia State Board of Education v. Barnette*, 63 S. Ct. 1178 (1943), struck down a requirement that public schools observe a daily flag salute and pledge. As attorney general, Mr. Jackson had bitterly denounced *Gobitis*, and in his later capacity on the court, he was able to exploit the uneasiness the decision had caused.

Barnette held that free speech includes the right to resist government coercion of expressions of loyalty. Justice Jackson penned the classic endorsement of freedom of conscience under the First Amendment: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Erratic Progress

The 1950s was a difficult period. The court wrestled inconsistently with loyalty oaths in the McCarthy era, but freedom of conscience survived. In 1962, school prayers were struck down in *Engel v. Vitale*, 82 S. Ct. 1261 (1962), and the denial of unemployment benefits to a man fired for refusing to work on his sabbath was ruled invalid, *Sherbert v. Verner*, 83 S. Ct. 1790 (1963). In the 1970s, a Jehovah's Witness in New Hampshire won the right to block out "Live Free or Die" on his license plate. *Wooley v. Maynard*, 97 S. Ct. 1428 (1977).

The continuing tension between individual conscience and social/patriotic obligations have led to some recent waffling. The court upheld military regulations that forbade an Orthodox Jew to wear his skullcap while on duty. *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986). It stood squarely behind drug laws when a Native American sought the right to smoke the hallucinogen peyote for ritual purposes. *Employment Division v. Smith*, 110 S. Ct. 2605 (1990). But it has twice upheld the First Amendment right to burn an American flag as a form of protest—in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), and in *U.S. v. Eichman/Haggarty*, 110 S. Ct. 2404 (1990).

But battles rage in the private sector, where federal (and most state) constitutional rights do not constrain private parties from elevating ideological conformity over freedom of conscience. On private college campuses, a rigid ideological conformity has been imposed under the guise of sex and race "harassment" speech codes or "mandatory sensitivity training." And although civil rights laws limit the firing of employees because of race or religion, dismissal for expressing unpopular beliefs is hardly unusual.

Ironically, contorted state civil rights laws sometimes limit rather than foster the right of conscience—particularly when expressed in politically incorrect ways. The Massachusetts state courts ruled in 1994 that state "public accommodation" laws prohibited a private organization of conservative Irish Catholics from excluding gays and lesbians from marching under a gay rights banner in the St. Patrick's Day Parade. Only in 1995 did the U.S. Supreme Court rule that such civil rights laws may not be used to limit speech and conscience.

The NRA brouhaha has abated, although the larger problem is far from settled. But the organization should reconsider the clause requiring a player to stand for the pledge and should recognize that one person's patriotic symbol may be another's graven image.

Mr. Silverglate is a bimonthly NLJ columnist and a partner in the Boston firm of Silverglate & Good.