

The Baldy Center for Law & Social Policy
Podcast Season 1, Episode 6
Podcast recording date: August 31, 2020
Host-producer: Azalia Muchransyah
Speakers: David Gerber and Bruce Dierenfield
Contact information: baldycenter@buffalo.edu

Podcast transcript begins

[Azalia]: Hi everyone this is the podcast of the Baldy Center for Law & Social Policy produced at the University at Buffalo. I am your host and producer Azalia Muchransyah. This episode I have on the phone with me David Gerber and Bruce Dierenfield co-authors of *Disability Rights and Religious Liberty in Education: The Story Behind Zobrest v. Catalina Foothills School District*. David is a University at Buffalo Distinguished Professor of History *emeritus* and Director *emeritus* of the University at Buffalo Center for Disability Studies and Bruce is a Professor of History and Director of the All College Honors program at Canisius College. David and Bruce, can you tell us what is your book about and what draws you into this topic?

[David]: Bruce and I have been concerned from a variety of directions in our teaching and in our publishing careers with questions that have to do with on the one hand disability and on the other hand First Amendment constitutional law in regard to religious liberty and state neutrality in matters of religion. The *Zobrest* case, which we've written a social history of, brings together both of these directions in one complicated lawsuit filed by people who lived in suburban Tucson, Arizona in 1988, and it was compelling for us because of the nature of the problems in law that came together in the one case.

[Bruce]: It was clear also that there was no one right position I think and so it was such, as David alludes, it was a complicated case and we tried to understand it on its own merits. I would say secondarily that I've always been interested in the division, the political division, the ideological division between those who sought reforms, sought to try to address problems in society, including those dealing with disabilities which was a new area of the law and jurisprudence and so it's fun to sort that tangle out. And I should mention parenthetically that I identified with the case in particular because I myself have significant hearing issues which were a significant part of the case and our understanding of what was going on with that family.

[David]: One of the things that particularly compelling about cases like the *Zobrest* lawsuit is that they involve a conflict of rights, there're rights claims on both sides of the issue and that's one of the factors that makes this particular case, among many factors, very complicated. At the heart of the case however are perfectly ordinary kind of American middle class people who are struggling to find ways to gather the resources together to educate their son who was profoundly hearing impaired and it mattered to us to take a kind of third element or direction of our analysis: the issue of why of kind of ordinary people come to a position where they file lawsuits and pursue these lawsuits to the highest court in the land where there's many disincentives to doing so. So the social

history aspect that you allude to that has to do that makes the book seem at times like a novel or like a narrative that is out of real life, uh has to do with this perspective of asking questions about why ordinary people file lawsuits and why they pursue them. What we learned of course is that the Zobrests are far from ordinary people and uh particularly uh Mrs. Zobrest, Sandy Zobrest, is a woman of really uncommon force and direction and she became an outstanding figure in the context of our understanding this case.

[Bruce]: Remember also that from the Zobrest point of view right was on their side. This was a simple matter not a complicated matter and so they expected to be provided a uh sign interpreter uh in a private or non-public school the same way that Jim Zobrest had received one in the public-school system, when he had been part of that. So they don't really appreciate how difficult or involved this fight is going to be they believe that the First Amendment guarantees them freedom of religion, that is to send their son to a Catholic school, and they noted the laws that had been, passed uh what came to be called the Individuals with Disabilities Education Act, provided for accommodations and assistance and for them it was an open and shut matter. They don't realize how many years it's going to take, the cost involved, and uh the unlikelihood that they would even get a hearing uh at the Supreme Court level.

[Azalia]: You mentioned that the Zobrests thought that this is going to be a simple case, what made it complicated?

[David]: I think it's important at the outset to understand that as Bruce said the Zobrests felt quite strongly that the Individuals with Disabilities Education Act was on their side. What turns out to be the case was that while that law spoke strongly to providing resources for children with disabilities in K-12 education, it spoke most strongly to students pursuing education in public schools. The issue of students getting resources who were in religious schools, ran right up against a complicated long history of adjudication of the First Amendment and the issues of state neutrality and education. So and that matter was not addressed directly or explicitly, certainly clearly, in the Individuals with Disabilities Education Act, and in fact in the Supreme Court decision in the *Zobrest* case the minority shrugged its shoulders, raised its hands, and said do we really know what the law says? Right up until that level there was confusion on that question.

[Bruce]: And further the uh the minority, the dissenters in the Zobrest case felt there was no need to adjudicate this matter at all because of what's called the avoidance doctrine and that is uh the Supreme Court should try to avoid constitutionally based decisions if it doesn't have to. So, from let's say Justice Harry Blackman's point of view, he wrote the dissent, there was no need to get into this and the majority simply was interested in moving into an area that need not have been decided. To point out further, the people who brought the case, the petitioners [...] who brought the case, the school district, they did not bring the matter of the law to the court's attention and so that was a huge mistake. And so, it was adjudicated on the basis of the First Amendment only and that Justice Rehnquist who wrote the opinion decided was uh in favor of the Zobrests. And so the sign interpreter was permitted to be paid for by the state.

[David]: I think Bruce raises a very important point which is that the Supreme Court which we associate with interpreting the Constitution uh really doesn't go out of its way to take cases where fundamental questions under the Constitution have to be interpreted. The court exists to create stability in law, among other things, and if in every case it takes up, it's dealing with first principles the possibilities of it contradicting itself of a number of different stories running simultaneously on what the Constitution actually says increase, and there's a long tradition of believing the more those difficulties increase, the worse it is for the stability of the political system in the system of government in the country.

[Azalia]: How does this case affect the future?

[David]: One never knows how it is that Supreme Court decisions are going to form precedent for the future decisions. The *Zobrest* case itself was looked at by strict separationists, people who believe in a wall of separation between church and state as a uh sort of chink in the wall, a uh a dent in the wall, and I don't think it has been used that way. There have been several cases however in which *Zobrest* did form explicitly a precedent for lessening the tension between church and state. The case hasn't come up recently in a number of Supreme Court decisions explicitly that have moved in a more serious and direct way to take down what the metaphor is, the wall of separation. But there was one case in the 90s in particular in which the *Zobrest* case was a significant precedent for the court's decision.

[Bruce]: Let's just acknowledge that uh the *Zobrest* decision was part of a number of cases that have been coming down, that came down the pike before the Supreme Court to seek accommodation or non-preferential treatment for religious schools and in that sense it's part of a gathering momentum on the part of those uh who believe that there was no real reason, no constitutional reason that is, that people who send their children to non-public schools including religious schools couldn't get benefits. So uh the court has been opening the door or more than denting the wall of separation, they have actually created a hole through it if you like or pulled the wall down, whatever metaphor you want. For some time the court has now enunciated certain principles uh that I think can guide it and *Zobrest* is part of that general movement to figure out how to provide some sort of assistance without going too far. There's the rub of course, what's too far? But the *Zobrests*, the in the *Zobrests* the court William Rehnquist argued that there is no real harm in what is happening here. The real beneficiary is not a religious institution but a family who has a disabled son and so it can be permitted. And as I say *Zobrests* didn't start this school of thought in the law but it certainly continued it.

[Azalia]: What are the main takeaways of your book

[David]: Well I think one of the uh takeaways is the amount of strength of character and resolve that people have to have to pursue these uh ultimate kinds of issues. Um the *Zobrest* lawsuit it wasn't uh an auto accident or a conflict with a neighbor about uh a barking dog, these were very complicated questions in law and the pursuit of these questions required tremendous resolve over a period of years. One of the takeaways is if

we're asking why do people file lawsuits, one of the insights derived from that is the difficulty of doing so on complicated issues and the necessity of having a strong resolve in pursuing them.

[Bruce]: I would add that our book tries to reveal what it is like to be deaf in a hearing world. And you know in the last couple of generations we've gotten more comfortable with people who have serious hearing impairment, but keep in mind this was not something that most people were familiar with and not used to making accommodations, so that's very much part of our story too.

[David]: Yeah, I think that's an important point to make for people who will be listening uh into this podcast. In addition to the conflict of the areas of law and the conflict in law between two different directions that law takes, part of our story and a large part of our story is the Zobrests' struggles to provide an education for their son, the changes of schools that they made, the experiments with a variety of methodologies for deaf education that these schools suggested to them, and the intensely sort of the intimate private world of family in which these decisions were made. So I think that uh when some of the uh book reads like a novel, it's those parts where we narrativize the family struggles from the family up as it were, in a perspective that sort of constitutes the heart of that deafness narrative for us.

[Bruce] We couldn't have written the kind of book we did without the cooperation of the principal character in the story. So uh you know we had the complete cooperation of the Zobrest family first, we had the cooperation of attorneys, or the uh children of the attorneys involved in the case, we had the access to the teachers, uh we saw various uh all the buildings where uh Jim Zobrest went to school. So, we had splendid cooperation and it's that kind of thing allows us to tell the details that enliven an account such as this.

[David]: One of the positive elements of having a cooperative authorship was that uh interviews that we did um we spent a good deal of time in conversation with one another about the meaning of testimony of the people we interviewed the [...] their testimony um and um tried to find ways to satisfy our desire to be as accurate as we could out of interviews that you know took the form of ordinary conversation, where people didn't parse their language necessarily carefully. Another thing was that we went back to the people we interviewed particularly the Zobrests, on occasion after occasion in writing the book to make sure that we had the details correct. It turned out even after all of that collaboration and all of that uh circumspection, that uh we found a few very minor errors in the published version that we're seeking to correct. They're very minor but the fact is that this kind of in-depth research effort with the materials that we use, particularly oral history interviews, is a very complicated manner of interpretation.

[Azalia]: Anything else you would like to add?

[Bruce]: Well I'll say this, the Supreme Court essentially finessed the question of disability in the Zobrest case, preferring to focus on the church and state issue rather

than disability and that was uh disappointing for those who are disabled and who look for the, wanted the court to address that more directly.

[David]: In the wake of the decision a professor at Gallaudet University, the university in Washington D.C., that has a hearing impaired and deaf student body, entitled an article that he wrote uh “what they don't know might have helped us.” What he meant by that was the court without seeking to find out too much about the nature of the Individuals with Disability Education Act, made a decision which nonetheless was going to profit some people with disabilities.

[Azalia]: That was David Gerber and Bruce Dierenfield co-authors of *Disability Rights and Religious Liberty in Education: The Story Behind Zobrest v. Catalina Foothills School District* and this has been the Baldy Center for Law & Social Policy podcast produced at the University at Buffalo. For more episodes, please visit our website buffalo.edu/baldycenter and follow our social media on Facebook and Twitter @baldycenter. Until next time, I'm your host and producer Azalia Muchransyah.