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Russell Pearce

Fordham University School of Law, RPEARCE@law.fordham.edu

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FAITH AND THE LAWYER'S PRACTICE

RUSSELL G. PEARCE†

I am going to start with two texts relating to faith and the lawyer's practice. The first is an opinion of the Tennessee Board of Professional Responsibilities, which Howard Lesnick has written so eloquently about.¹

A lawyer who believed that abortion was murder was appointed by the court to represent teenage girls who were seeking consent for abortions by seeking court waivers of parental consent for abortions.² He asked the Tennessee Board for advice on a number of issues including: one, could he advise his clients about alternatives to abortion; and two, could he decline to accept the appointment for religious reasons.³ Although the decision relating to the appointment was up to the court and not the board, in a rather lengthy opinion, the committee responded that to give such advice or to decline such an appointment would be unprofessional.⁴

In the second text, the Maggid of Mezeritch went to study with the Baal Shem Tov, who was the founder of the Hasidic movement on Judaism.⁵ The Baal Shem Tov gave the Maggid a book and asked the Maggid to read to him.⁶ The Maggid read but the Baal Shem Tov said that that was not satisfactory.⁷ The Maggid responded that he got all the words right.⁸ What was the problem? The Baal Shem Tov told him he knew how to

† J.D., Yale Law School; B.A., Yale College. Professor of Law and Co-Director of the Louis Stein Center for Ethics and Law at Fordham University School of Law.

¹ See Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 *FORDHAM L. REV.* 1469 (1998).

² See *id.* at 1469.

³ See *id.*

⁴ See *id.* at 1469-70.

⁵ See ELIE WIESEL, *SOULS ON FIRE: PORTRAITS AND LEGENDS OF HASIDIC MASTERS* 54-55 (Marion Wiesel trans., 1972).

⁶ See *id.* at 55.

⁷ See *id.*

⁸ See *id.*

decipher the signs, but his reading lacked soul.⁹ Whereupon, the Baal Shem Tov picked up the book and began to read and according to the Maggid, the room filled with light and it was as if he was standing in Sinai again.¹⁰

If there is a religious way to read, is there a religious way to be a lawyer? More and more lawyers, judges and scholars are answering yes to that question. We heard earlier from Cardinal Bevilacqua about the history of the Religious Lawyering Movement, which blossomed in the 1990s. There was writing about the law and religion before that time.¹¹ We can date religious lawyering as a body of work in mainstream legal literature, as Cardinal Bevilacqua did, to the work of Professor Thomas Shaffer in the 1980s.¹² Why did this movement take off in the 1990s?

Before I answer that, I just want to say that as long as we are talking about the movement, I do want to acknowledge the contributions of Sam Levine¹³ who has been affiliated or was affiliated with this law school. He has made some of the most important contributions to the Religious Lawyering Movement, especially in the area of Jewish lawyering.

Again, what accounts for the growth of the Religious Lawyering Movement? A renewed interest in religion across society as a whole is one reason. Related to that, lawyers, like others, are engaged in a search for meaning in their work. In the past, many lawyers would have found this meaning in professionalism, but during today's crisis of professionalism, lawyers are unable to find a satisfactory way to reconcile their personal aspirations with what they consider to be the harsh realities of the marketplace.

The organized bar has been singularly unsuccessful in

⁹ See *id.*

¹⁰ See *id.* For further discussion of applying the concept of acting with soul to the practice of law, see, Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH L. REV. 1259, 1267-70 (1996).

¹¹ See generally Thomas L. Shaffer, *The Practice Of Law As Moral Discourse*, 55 NOTRE DAME LAWYER 231 (1979); Thomas L. Shaffer, *A Lesson From Trollope for Counselors at Law*, 35 WASH. & LEE L. REV. 727 (1978).

¹² See THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981)

¹³ See Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199, 1210 (1996) (discussing how religious faith and thought impacted the author's career, from law school to his practice in criminal law).

finding a way to encourage lawyers to meet their obligations to the public good and to live a work life of high ethics. Under these circumstances, increasing numbers of lawyers, who find meaning in their faith, are exploring whether their faith offers a source of meaning for their work.

As the Religious Lawyering Movement has grown and matured, it has divided into different schools of thought. Today, I am going to talk about the two approaches to the question of professionalism. One school believes that religious lawyering can exist with professionalism, and indeed can be mutually supportive. The other believes that religious lawyering and professionalism are inevitably in conflict and that professionalism should be rejected.

Commentators in the first school make three kinds of arguments. First, they argue that religious values reinforce professional values. They look to particular professional duties, like the obligation to provide pro bono service to the poor. They find support for that obligation in the religious value in service to the poor. They look to the professional notion of civility and find religious understandings or demands that we treat each other with respect.

Second, they argue religion and professionalism both develop virtue and character. Professor Timothy Floyd, for example, argues that through the practice of law, a lawyer applies and develops virtues that make the lawyer a better professional and a better religious person.¹⁴ He points to the virtues of prudence, temperance, fortitude and justice.¹⁵

Third, they argue that nothing in legal ethics prevents lawyers from drawing on religious values. Professor Bruce Green argues that legal ethics offer wide areas of discretion in which lawyers can fill with whatever values they want.¹⁶ These include who to represent and whether to counsel a client morally and how to counsel them.¹⁷

But what about the Tennessee opinion that I mentioned earlier? I think that opinion underscores a failing of this school

¹⁴ See Timothy W. Floyd, *The Practice of Law as a Vocation or Calling*, 66 *FORDHAM L. REV.* 1405, 1415 (1998).

¹⁵ See *id.* at 1421-22.

¹⁶ See Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscientious Avoidance, and Prosecutorial Discretion*, 66 *FORDHAM L. REV.* 1307, 1307-08 (1998).

¹⁷ See *id.* at 1309-12.

of thought. I believe this school of thought has a lot of superficial appeal. When you get beyond the surface of religion and professionalism, you find, like the Tennessee Board, a fundamental contradiction. Why does this contradiction exist?

As Professor Sanford Levinson has noted, professionalism requires lawyers to exclude or, in his terms, "bleach out" the contingent aspects of the self, including one's faith.¹⁸ Professionalism assumes that the actors in the legal system are neutral and fungible.¹⁹ There should be no difference between a male lawyer and a female lawyer, between a white lawyer and a black lawyer, between a Christian, Jewish or Muslim lawyer.²⁰ In a system that aspires to equal justice under law the quality of justice and the lawyering a person receives should not depend on the religion of the lawyer.

Why would religious lawyers challenge professionalism? Professor Allegretti has pointed out in his previous work that not of all them would.²¹ Some people, for religious reasons, would totally separate religion from the secular world and others would find fulfillment of their religious values in secular professionalism. Many religious lawyers, however, would not. Those who would separate religion from the secular world echo the language of their own faith, such as the Baal Shem Tov's advice to the Maggid of Mezeritch. Those who would agree with Martin Buber recognize that we shall accomplish nothing at all if we divide our world and our lives into two domains, one in which God's command is paramount; the other governed exclusively by the law of economics, politics and the simple self-assertion of the group.²²

In a similar spirit, earlier today, Cardinal Bevilacqua urged that lawyers place the judgment of God before the judgment of their colleagues. Must you reject this rule of law to be this type of religious lawyer? I think not. You need not reject the rule of law but you must rethink it. We live in a time when many are skeptical of claims of neutrality. When many believe that lawyers and even judges are influenced by their race, gender,

¹⁸ Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1601 (1993).

¹⁹ See *id.* at 1578-79.

²⁰ See *id.* at 1579.

²¹ See JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING* (1996).

²² See MARTIN BUBER, *ON JUDAISM* 25-27 (Nahum N. Glatzer ed., 1967).

politics and religion. Those of us who believe in the rule of law may be better off if we forego obsolete notions of neutrality.

As Martha Minow has written, you cannot avoid trouble through ignoring difference, nor can you find a solution in neutrality.²³ She instead suggests striving for impartiality “by admitting our partiality.”²⁴ We should seek to create community by joining to explore the potential for the rule of law in light of how we are all different, as well as, how we are all the same. Professor David Thomas of Harvard Business School has observed that organizational goals such as rule of law for lawyers are best maximized when group identity differences are openly acknowledged and managed.²⁵

So what is the future of the Religious Lawyering Movement? As long as professionalism continues to fail to provide meaning to most lawyers, interest in the Religious Lawyering Movement will grow. As long as the Religious Lawyering Movement continues to grow, it will increase the pressure on the community of lawyers to find a new paradigm to replace professionalism, just as professionalism superseded republicanism in the late 1800s. When the new paradigm arrives, it will make extraordinary demands on lawyers.

How much more challenging than the ideals of professionalism are the three ideals Cardinal Bevilacqua presented to us this morning? What an awesome challenge for lawyers. Their work is fundamental to the foundation of the world, the determination of truth, the administration of justice, and the maintenance of peace.

²³ See Martha Minow, *The Supreme Court 1986 Term: Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 75 (1987).

²⁴ See *id.*

²⁵ See Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613, 1636 (1993) (discussing Professor Thomas' suggestion that “organizational goals . . . are best maximized where identity group differences are openly acknowledged and managed”).

