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TODAY'S RELIGIOUS LAW SCHOOL: CHALLENGES AND OPPORTUNITIES

REX E. LEE*

I am highly honored and pleased to be the keynote speaker for this conference for two separate but interrelated reasons. First, in any context, I would be honored to be included in the distinguished company of the participants of this symposium. Second, the subject of this symposium is as important as it is interesting.

Nine years ago, at the invitation of Steve Frankino, I gave the Giannella lecture at the Villanova Law School on the subject "The Role of the Religiously Affiliated Law School." I said that many in legal education would assess that issue succinctly in five words: Religious influence has no effect. These five words describe the middle of the road position. In the view of many legal educators, the effect of religious influence on the quality of legal education is negative. My own view is that a combination of learning both by study and faith can add a new dimension to the training of lawyers, resulting in a better end product.

A significant number of both educators and non-educators hold the view that a religious influence only deflects from the quality of a law school program. I would like to begin by confronting this view with a question and answer dialogue between myself and a secular inquisitor.

Q: Given that sincerely held religious beliefs have sometimes been used to justify slavery, racism, subordination of women, child abuse, military conquest, resistance to advances in science, and other atrocious practices, don't religiously based law schools have the potential for becoming educationally incompetent at best and powerful sources of retrograde influence at worst?

A: Nonreligious, secular movements have also been the source of atrocious practices. The slavery and the suppression of free thought that characterized secular Stalinism and the genocide that occurred in secular Cambodia under the Khmer Rouge regime are relatively recent examples. Reprehensible events admittedly have occurred in the past under the banner of sincerely held religious beliefs, but equally reprehensible events have transpired under the sponsorship of secularism. No compelling evidence exists which establishes that secularism can be preferred over religion as a fool-proof guardian of our most important values.

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What is clear, however, is that the core religious values practiced by a great majority of Americans are the same values inherent to a civically responsible legal profession. This core is neither repressive nor anti-intellectual. The small group of religionists that veers off into practices and beliefs that truly conflict with fundamental American values has no significant influence in late twentieth century American legal education and is unlikely to gain such influence. By contrast, the religious organizations that teach honesty, fidelity to marriage partners and children, responsibility for one's own actions, sacrifice of personal preferences for the common good, and other components of civic virtue, represent the overwhelming majority of American believers and also encompass the sponsorship of America's religiously based law schools. In short, the evidence overwhelmingly supports the conclusion that the danger of America's church-related law schools moving in bizarre and deleterious directions is too remote to be taken seriously.

This conclusion is bolstered by the fact that law schools must pass market tests. If religious beliefs lead a law school into curricular practices that are truly unsound, the bar passage and employment results for the graduates will be negatively affected in a way that will deprive those graduates of influence in the profession. Further, it will deprive the school of the future students it needs to remain in operation.

Q: I have carefully and thoughtfully reached the conclusion that secularism is the only intellectually responsible approach to legal education because it is the only approach that adequately tolerates the wide range of diverse views and experiences that give life to the study of law. Why then should I accept church-related law schools that are consciously organized to reflect particular doctrinal beliefs?

A: How can you talk about the importance of tolerance and of diversity and then ask this question? If you are truly serious about tolerance of disparate ideas and beliefs, then your principles require you to tolerate *religious* believers who express *their* beliefs by sponsoring religiously affiliated law schools that operate professionally sound educational programs. If you really believe in the virtues of diversity, then you must recognize the inappropriateness of insisting that all American law schools uniformly adopt the model of the secular state law school. On the other hand, if you have a hidden agenda—if you are so convinced of the rightfulness of your secular conclusions that you feel justified in squelching religiously based views—then it is you who has stepped outside America's core values of free expression, plural-

ism, and diversity. In so doing, you have effectively joined the fringe group of intolerant American religionists.

Q: But what if religiously affiliated law schools grow in number and crowd out secular schools? Why should I tolerate this threat to pluralism?

A: Get serious! Late twentieth-century America is overwhelmingly secular. The small number of religiously affiliated law schools is no threat to American pluralism. The greater threat to pluralism is the near conquest of the field by the secular model. Anyone seriously concerned about preserving pluralism should be concerned about preserving church-related law schools because they represent important islands of diversity in an otherwise uniformly secular sea.

With that imaginary dialogue regarding first principles as a backdrop, let us now consider more specifically some of the benefits of church-sponsored law schools.

Legal educators talk a great deal about the importance of incorporating values into our law-teaching programs. What better source of values is there than those that are religiously based? How could the profession and the public at large be better served than by the integration of social technical training coupled with a value system that is strongly held because its adherents are convinced that its roots find nourishment in divine soil?

For these reasons, I conclude that we should strive for the continuing existence of American Law Schools that are not only religiously affiliated, but serious about the significance of that affiliation. To strive for this goal is in the best interest of our students and our faculty. It also serves the interests of institutions, including all American law schools, and society as a whole.

At the same time, experience teaches us that religious law schools, and indeed religious universities, are fragile. Even as we speak, religious law schools may be qualifying as an endangered species. So many universities, not only in the United States but also throughout the world, began their existence with a religious affiliation, only to lose their spiritual anchorage, either in whole or in part, as they became more mature academic institutions. Indeed, many academics believe that there is a cause and effect: enhanced academic maturity and sophistication can be accomplished only by cutting loose from religious moorings. As stated earlier, I reject that proposition. If we do the job correctly, learning can occur through both extra-rational and rational processes. It follows that religiously affiliated law schools have something unique that can and should be offered to the universe of legal education.

The relevant issue, therefore, is not whether we should have strong, religiously affiliated law schools, but rather how we can keep them strong and viable. I would like to share several thoughts with you about this objective.

First, and probably most important, all of us who are serious about our religious anchorage need to recognize the value of what we have. We need to openly and unashamedly build on our natural advantage. For some reason, there has been a reluctance, almost an embarrassment, by legal educators with religious convictions to acknowledge anything other than a hermetically sealed relationship between our faith and what we teach. As Tom Shaffer has said, "[t]oo many candles are under too many bushels."¹ Perhaps this is due in part to the fact that matters of faith are so deeply personal that those of us who hold them do not want to subject them to the view and possible criticism of those who do not hold such beliefs. Another impediment may be an ill-defined notion that reliance on things learned through faith may somehow imply a lack of ability to learn through reason. In short, we need to get over the hurdles. Those of us who recognize both faith and reason as sources of understanding must start using our religious anchorage as a source of strength and enrichment, rather than something to be hidden or explained away.

I suspect that there would be little disagreement among legal educators that the inculcation of values is fundamental to the training of lawyers. As Derrick Bell has written, "Lawyers need conscience as well as craft. To borrow an old but picturesque phrase, skilled lawyers without conscience are like loose guns on a sinking ship, their very presence is so disconcerting that they wreak damage whether or not they hit anything"² And there is further consensus that neither the profession as a whole nor its law school component is making much progress toward integrating conscience and skill. We know the integration is important, but we do not have much of an idea how to go about doing it.

Viewed in this light, the case for the religious law school can be simply stated. These values, which are so important and yet so lacking in American legal training, include such things as a consciousness of the importance of public service, a realization that our profession involves much more than just another way to make a living, a concern about ethical standards that reach beyond the sterile content of written rules, and

1. Thomas Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 722 (1975).

2. Derrick A. Bell, Jr., *Humanity in Legal Education*, 59 OR. L. REV. 243, 244 (1980).

the notion that each individual's own well-being depends in part on the well-being of others. Yet these are also integral parts of the values that for millennia have constituted the foundation stones of Jewish, Christian, and other religious teachings. Thousands of years before there was a Langdell, a Wythe, or a Litchfield Law School, the Old Testament Prophet commanded people to love their neighbors as themselves. And the man from Galilee said that all the law and the prophets hang on two great Commandments. The first was to love God, and the second was to love one's neighbor as one's self. As one commentator has stated, "[i]n both the religious enterprise and the legal enterprise, we are in universes of persons who transcend the written documents: Our belief is in the persons."³

Religious law schools have always had legal education's greatest boon right under our noses, but we have yet to take full advantage of it. To the extent that we can successfully incorporate that powerful—note that I do not say simple, but powerful—admonition to love our neighbors as ourselves, we will have taken very large steps toward solving some of legal education's most important challenges. These challenges include: teaching ethics on a sound theoretical foundation, forming a healthy respect for other members of the profession, and challenging students to recognize the lawyer's obligation to use his or her professional training to improve society and the individual human beings who constitute our society.

Second, I believe that religiously affiliated law schools must be different from other law schools if they are going to make a distinct contribution. We have to be good, judged by the most rigorous secular standards; and if we fail to be good, it won't help much to be different. But different we must be. Almost a decade ago, my friend Richard Huber, who was then serving as dean of the Boston College Law School, wrote me that "religion has been the basis of moral codes historically and some sort of fuzzy humanism cannot replace it."⁴ Judge John Noonan, of the United States Court of Appeals for the Ninth Circuit, is more explicit. He says:

I . . . insist that none of the special features [of a Catholic law school] is possible without a community of believers. A Catholic law school does not exist unless a substantial number of the faculty are in fact committed Catholics. Nor would such a faculty

3. John T. Noonan, Jr., *Belief in Law and Belief in Religion* 27 J. LEGAL EDUC. 386, 389 (1975).

4. Letter from Richard Huber, Dean, Boston College Law School (on file with author).

alone be able to sustain itself in isolation if the great part of the student body were not also Catholic. If a religious law school may not consciously discriminate in preferring coreligionists over others, it not only risks losing the community it needs in order to embody its spirit, it also risks losing that range of representatives who individually embody the faith.⁵

Judge Noonan further asserts that:

The same observation holds true of Cardozo and Brigham Young. I cannot believe that a school whose faculty and student body were not largely composed of the Orthodox would have the interests of Cardozo, nor that a faculty and student body not largely made up of members of the Church of Jesus Christ of Latter-Day Saints would have the character of Brigham Young.⁶

Professor Douglas Laycock agrees, and anchors his views concerning the right of hiring preferences to principles of academic freedom. He argues:

At the very least, these [religious] schools must indulge a hiring preference. They must be free to take into account their need to maintain the necessary core of Catholic faculty or Mormon faculty or whatever. Given the realities of the teaching market, they will get plenty of applications from non-Catholics, from non-Mormons, from people who are not attracted to the institution but want some teaching job somewhere. Some of these applicants, if hired, will be committed to changing the institution, committed to turning Notre Dame or Baylor into Northwestern or Vanderbilt. The institution has to be able to take account of the religious part of its needs at the hiring stage.⁷

I agree with Noonan and Laycock. Others do not. And indeed there are probably participants in this conference, and certainly some faculty members at religious law schools, who take a different view concerning religious preferences in hiring faculty and admitting students. But the important point, I submit, is that regardless of how we come out on the specific issue of whether such preferences are a wise and good policy for the Cardozos, the Notre Dames, the Brigham Youngs, the Campbells, or others among us, we all have a common interest in preserving that prerogative for those who deem it important, a prerogative which Laycock

5. John T. Noonan, Jr., *Religious Law Schools and the First Amendment*, 20 J. C. & U. L. 43, 45 (1993).

6. *Id.*

7. Douglas Laycock, *Rights of Religious Academic Communities*, 20 J. C. & U. L. 15, 19 (1993).

(correctly in my view) finds rooted in academic freedom, and probably in the Constitution itself.

The arguments on both sides of hiring preferences and other policies and practices related to maintaining the distinctiveness of our religious schools are tied to diversity. Those who oppose the Noonan and Laycock view argue that (1) diversity is a good thing, and (2) such practices as hiring preferences and codes of moral conduct inevitably result in a less diverse faculty and student body. But if we take a broader view of diversity, a macro- and not just a micro-view, religious law schools that are really serious about integrating their religious beliefs and practices into their educational program greatly enhance the diversity and the richness of the total universe of American legal education. It is anomalous that some of the most vigorous advocates of diversity insist that one person's diversity must be the same as everyone else's diversity, or we are not truly diverse.

In short, regardless of how any of us approaches such issues as prayer in the classrooms, crucifixes on the walls, abstinence from alcohol and tobacco, or hiring preferences, we all have a common interest in preserving a range of prerogatives that religious schools may choose for themselves. Without that kind of institutional academic freedom, our ability to make a unique contribution to our students, our faculty, and to legal education as a whole will be seriously impaired.

Judge Noonan observes that "[t]here is a strain of thought in American law that views religion only as individual activity."⁸ Noonan concludes that, William James notwithstanding, "it is a view that also eliminates or ignores another large part of religious experience."⁹ Indeed, he goes so far as to say that "[h]istorically, it is fair to say that the First Amendment must *primarily* have had in view the free exercise of religion by persons joined together in a religious body."¹⁰

I agree with Douglas Laycock that individual and communal religious freedom cannot really be separated. In his words:

For most believers, part of the individual exercise of religion is to form and join in communities of faith exercising the same religion. I do not think it matters whether we conceive of religious exercise as a group right or an individual right. I think it is both, as Judge Noonan has said. But even if one conceives of it only as

8. Noonan, *supra* note 5, at 46.

9. *Id.*

10. *Id.* (emphasis added).

an individual right, part of that individual right is the right to form a religious community.¹¹

To date, the most authoritative *judicial* statement of the religious rights of a community is found in Justice Brennan's concurring opinion, joined by Justice Marshall, in *Corporation of Presiding Bishop v. Amos*.¹² He states: "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."¹³

In support of his position, Justice Brennan relies on Karl Barth, Robert Cover, and Michael Perry. As Judge Noonan says, "It is scarcely an accident that the two brilliant contemporary law professors whom Brennan invokes, one Jewish, one Catholic, come to the same conclusion as the great Protestant theologian and the liberal Supreme Court Justice."¹⁴

The *Amos* case arose in the context of the constitutionality of the statutory exemption afforded by Title VII to religious employers to prefer their own employees. The issue was whether this exception from Title VII's general prohibition against employment discrimination based on race, gender, national origin, or *religion* violated the establishment clause.¹⁵ Thus, the protection afforded by *Amos* depends on the existence of a federal statute. Although the church in *Amos* argued that even in the absence of the statutory exception, its result was required by the free exercise clause, the Court confined its decision to the statutory and establishment clause issue.¹⁶ As a consequence, the extent, if any, of constitutional protections that may be available is yet to be determined. And in the statutory area as well, other important issues will follow in the wake of *Amos*.

There is a danger that the courts will, after acknowledging the importance of institutional or community freedom of religion, go on to limit this freedom by giving their own judicial prescription of what is and is not permissible. A particularly disturbing recent case is the Ninth Circuit's decision in *EEOC v. Kamehameha Schools*.¹⁷ The Kamehameha

11. Laycock, *supra* note 7, at 15-16.

12. 483 U.S. 327 (1987).

13. *Id.* at 342.

14. Noonan, *supra* note 5, at 47.

15. *Amos*, 483 U.S. at 335.

16. *Id.* at 327.

17. *EEOC v. Kamehameha Sch.*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993).

Schools are operated by a nonprofit charitable trust established by the will of Bernice Pauahi Bishop. Her will required that both the trustees and the faculty be exclusively Protestants. The Hawaii Supreme Court, whose interpretation of the will should be dispositive, characterized Mrs. Bishop's entire will as "permeated with expressions of her interest in the exposition of the Protestant religion." The court further stated that "[i]n recognition of this interest the trustees established the Bishop Memorial Church as an integral part of the Kamehameha Schools and injected religion in the school program."¹⁸ A planning survey of Kamehameha done in 1961 by the management consulting firm, Booz, Allen, & Hamilton, found that "the objectives of the religious services sponsored by the Kamehameha Schools are to provide a Protestant Christian atmosphere which pervades every aspect of campus life. . . ."¹⁹

The lawsuit against the Kamehameha Schools was brought by a non-Protestant applicant for a teaching position who contended that the schools' Protestant-only requirement for teachers violated Title VII. The Kamehameha schools argued that they were a "religious educational institution" and that section 702's religious exemption to Title VII authorized them to discriminate in their faculty hiring policies based on an appellant's religious background. The district court granted the schools' motion for summary judgment, finding, among other things, that the schools had had an over 100-year-old unbroken chain of mandatory devotional services, religious education requirements, and prayers. The court further stated that although the schools were not owned and operated by a church, they had a "religious orientation similar to that found in most church-schools."²⁰

The Ninth Circuit reversed,²¹ and the Supreme Court—as is its wont these days in so many meritorious cases—denied certiorari.²² Two aspects of the Ninth Circuit opinion are of particular concern. First, the Court of Appeals ruled that all of Title VII's statutory exemptions, including section 702's religious educational institution exemption, are to be "construe[d] . . . narrowly."²³ Since the court cited no support for this proposition, I do not believe it is the law, except in the Ninth Circuit.

18. *EEOC v. Kamehameha Sch.*, 780 F. Supp. 1317, 1324 (D. Haw. 1991), *rev'd*, 990 F.2d 458 (9th Cir.), *cert. denied*, 114 S. Ct. 439 (1993) (quoting *Murray v. Kobayashi*, 431 P.2d 940 (1967)).

19. *Id.* at 1326.

20. *Id.* at 1328.

21. *Kamehameha Sch.*, 990 F.2d at 458.

22. 114 S. Ct. 439

23. *Kamehameha Sch.*, 990 F.2d at 460.

The Ninth Circuit would appear to be in conflict with the Third and Fourth Circuits on this issue. Second, under the Ninth Circuit's approach, *courts* are to make the determination whether, under its "narrow construction" test, the institution at issue is "primarily religious" or "primarily secular."²⁴ This approach, at least on its face, appears to involve the courts in intrusive "entangling" inquiries into religious matters.

My own view is that once a minimum threshold of religiosity is established—as it certainly was in the *Kamehameha* case by the Hawaii Supreme Court's interpretation of Princess Bernice's will and the district court's findings—then section 702, as well as constitutional principles and common sense, requires that the particular approach to religiosity taken by any given institution, and also assessing how well the institution is succeeding in achieving its religious objectives, should be left to the institution's judgment. Such decisions should not be left to the courts. I find it troublesome that the Ninth Circuit, in direct contravention of both Hawaii's Supreme and district courts, made its own judgment that *Kamehameha* was not sufficiently religious. The court also placed more weight on the lack of formal church sponsorship than it did in *Mrs. Bishop's* requirement of an all-protestant board of trustees and an all-protestant faculty. Two decades of personal experience with a religious school have led me to conclude that the two most important bulwarks against disintegration of religiosity are a board of trustees and a faculty composed of believing, practicing adherents of the sponsoring religion.

It matters not whether the issue is hiring preferences, sexual conduct, accreditation standards, positions on abortion and pornography, or just general encouragement and understanding. We are all in this together. We are both our brother's and sister's keepers. Whenever the bell tolls for any religious law school, it tolls for all. Just because a particular religious issue is troublesome to another law school does not mean we can ignore it and not get involved. If one of us is affected, we are all affected.

More than tolerance is at stake. To be sure, common decency and civility, and probably legal right as well, entitle us to be tolerated. But we must rise above the neutral zone of simple acceptability and tolerance. As Stephen Carter has said: "Toleration, in short, means only allowing someone to exist—but one may exist and still be oppressed. . . .

24. *Id.* at 461.

Tolerance without respect means little."²⁵ We have something to offer which will benefit both the profession and society.

During the days when I was trying to get our new law school off the ground at Brigham Young University, with all of the challenges posed by the fact that we are religious and have some peculiar requirements and characteristics, the most valuable help and encouragement I received was from Tom Shaffer, who was then the Dean at Notre Dame. That help meant a great deal to me at the time, and now, twenty-two years later, those of us who are serious about incorporating our faith as an integral part of our total educational program still have just as great a need for encouragement and assistance from others who share similar objectives.

A little over eight years ago, in response to some questions I had asked concerning what kinds of differences religious influence makes to a law school, Dean Davis of the University of Dayton responded, "The world is a more interesting place when people have beliefs, convictions, and a song to sing."

Clearly, we have a song to sing. And the song is ours because of our beliefs and convictions. Let us sing it. Let our voices be neither muted nor silent because of concern that our music may not be pleasing to the ears of others whose respect we crave or because the particular song may come out of somebody else's hymnbook. And let us join in one united chorus, each in support of the musical efforts of the other.

25. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 93 (1993).

