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RIDING THE SECOND WAVE OF THE SO-CALLED RELIGIOUS LAWYERING MOVEMENT

HOWARD LESNICK[†]

I first need to say that I am glad that I am here. Whenever I come to a program at a Catholic law school, oddly enough, I feel as if I have come home. I feel this way because the things that nag at me about being a lawyer and, predictably, the teaching of people who are going to be lawyers that are so difficult to bring into my work are right out here on the table. I find being a part of this symposium extremely nourishing and if you have ever had the experience of starving at a banquet, you know what I am talking about. As for the Vincentians, I know nothing about them but I have attended St. Vincent's Church, in Philadelphia, four or five times for mass on special occasions. I find it an incredibly joyous religious experience.

I will talk mostly about what I call, in a rather grandiose retitling of my informal remarks, Riding the Second Wave of the So-called Religious Lawyering Movement. I will pick up where Russell Pearce left off in more ways than one. He quickly summarized the first part as the need for some lawyers to find in their faith, or other's faith, traditions relevant to guidance into how they should live their professional lives and the difference that the norms of professionalism create. I question whether the professional norm should make space for the resolution of the conflict between faith and profession in favor of the lawyer's call of faith.¹

The Second Wave is one in which the calling, as addressed to the religious lawyer, asks what are you doing practicing law? The answer can be found once the lawyer disregards what the Bar Association, the profession, and the partners are going to think about you.

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¹ For further discussion, see generally, Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469 (1998).

One of the oldest stories in the world is about the man who is walking along and he comes upon three masons. He goes over to the first mason and he asks, "What are you doing?" This mason says he is laying stone. The man asks the second mason, "What are you doing?" This mason says, "I am earning some money to feed my family." The man then asks the third mason, "What are you doing?" This mason says, "I am building a cathedral to testify to the glory of God." Obviously, in that story the third mason comes out on top. I believe we should elevate the second mason a little.

To put it in a religious perspective, let me use, as an example, an excerpt from a passage by a noted Islamic scholar, Seyyed Hossein Nasr.² He says, the *Shari ah* [Divine Law] is the path that "gives a religious connotation of all the acts that are necessary to human life In this way, the whole of man's life and activities become religiously meaningful."³ "There is a *Hadith* [saying of the prophet] according to which when a man works to feed his family he is performing as much an act of worship as if he were praying."⁴ Based on this, the second mason should be held in the same regard as the third mason.

What are you doing? Tom Shaffer has made what I think is the crisp, eloquent statement on the basic proposition and he was talking about a lawyer, but what he said can apply to anyone, even a stone mason. A lawyer is a person "called out of the church, sent out from the particular people to do something that is religiously important."⁵ The religious lawyer "stands in the community of the faithful and looks from there at the law . . . she is first of all a believer and is then a lawyer."⁶

That statement presents the two questions. One, what does the notion of being religiously important involve? In other words, what is it that God is asking of you in your practice? Two, what does it mean to be called out by the Church? While asking these questions, my colleague Seth Kreimer wrote:

To the Jew who takes tradition seriously, daily life ringed with

² See SEYYED HOSSEIN NASR, *IDEALS AND REALITIES OF ISLAM* (1967).

³ *Id.* at 98.

⁴ *Id.*

⁵ Thomas L. Shaffer, *The Tension Between Law in America and the Religious Tradition*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 28, 45 (Richard John Neuhaus ed., 1989).

⁶ THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 198 (1991).

an obligation [T]he sense that moral responsibility pervades daily life is one which we share as heirs of a tradition that does not draw boundaries which set religious obligations to one side as we enter secular life.

As Jewish [students], we cannot act in a moral vacuum. At a minimum, we must recognize that our professional acts have morally freighted consequences [E]very choice we make as a lawyer[], [such as] will contests, divorce proceedings . . . has an impact on the lives that are lived by the victims or beneficiaries of our actions and [by] the integrity of [a] system of justice in which we participate. We cannot claim indifference to those effects because we act on behalf of clients. Our . . . tradition requires us to be alive to the moral dimensions of the choices we make in our professional [life].⁷

Although the professional norm says you can claim indifference, there is a direct clash between this indifference and faith.

While talking about the Second Wave, what I would like to do is go beyond the classic situations of a clear mandate that comes from one's religion such as: not to help another to have an abortion, not to work on the Sabbath, and whether or not a Jewish lawyer can bring a suit against a Jew or a non-Jew in a secular court. Cardinal Bevilacqua talked about a move from the law and the adherence to rules and dictates to an ardent desire to go and follow what is right. He said you should do the right and the good. There is no need to say anything more than that.

There are three examples that illustrate this middle ground. First, Psalm 94 says "Can unjust judges be your allies, those who create burdens in the name of law."⁸ Those words are pretty lurid. When read narrowly we are talking about bribery and subterranean things. It also has broader meaning.

Contriving mischief under cover of law is the basic notion of what lawyers are supposed to do for their client. Lawyers tell themselves that they are not concerned with what is right, only with what is lawful. If my client is doing something lawful or can be found to be doing something lawful by proper means, then it is not their problem that the client's actions are unjust or mischievous.

⁷ Seth Kreimer, *The Responsibilities of the Jewish Lawyer*, 2 (unpublished article on file with the author).

⁸ *Psalms* 94:20.

The second example is from Leviticus, the Holiness Code:

When you reap the harvest of your land, you shall not be so thorough that you reap the field to its very edge, nor shall you glean the stray ears of grain. Likewise, you shall not pick your vineyard bare, nor gather up the grapes that have fallen. These things you shall leave for the poor and the alien.⁹

But, what of the belief that wealth maximization is a presumed neutral norm of everyday life? Leviticus tells us that wealth maximization is contrary to the law of God.

The third example is a wonderful example from Tom Shaffer. It deals with a direct clash between the "thou shall not" of the legal profession dealing with what the law calls maintenance. It has always been contrary to known professional ethics for a lawyer with a client in litigation to pay the expenses of your client. In recent years, an exception has been made for litigation costs. They can be "advanced." You can lend your client the money for discovery expenses and like expenses. Although everybody knows that if you do not win, you are never going to be reimbursed. We wink at that, but you may not pay medical expenses, and you certainly may not pay living expenses.

Tom sent me a draft of his recent article in which he wrote that he is changing his view of what God asks of him. He felt that some day he was going to lend one of his clients money because an insurance company—usually the defendant in the practice—is happy to delay the offering of a settlement until after a trial has begun, even if they will have to pay interest. They know that the plaintiff does not have the ability to indefinitely finance a suit. The insurance companies have a legal advantage and their lawyer is taking advantage of the rule against lending money to a client. Tom felt he had an obligation, based on his faith, not to let his client suffer extra because of this rule.

Again, what does he mean by church? What is your church? Tom does not mean the building in which he worships on Sunday, that he is a Roman Catholic, the institutional church, nor does he mean the priest of his congregation or the congregation itself.¹⁰ He is talking about the community of

⁹ *Leviticus* 19:9–10.

¹⁰ See SHAFER, *supra* note 6, at 199.

people of the spiritual descendents of the communities of Jewish and Gentile Christians described in the Book of Acts in the Letters of Paul: “[W]here the connection between faith and work is developed, talked about, described truthfully”¹¹ and “where questions of priority and behavior are resolved in discussion [accompanied with the Holy Spirit.]”¹²

Tom is talking about a dialogue with the people who may in fact be fellow parishioners of a Catholic church. The dialogue may include five or six people scattered around the country of different faiths who discuss what God wants them to do? This dialogue does not involve professional ethics, but religion. In most faiths, when we go to lay people with a moral problem that has religious dimensions and ask what we should do, they usually lack answers, unless the problem is clearly contrary to a religious rule.

In professional responsibility there are two poles: you shall do this and you shall not do that. The lawyer does not have a problem with the shall and the shall not. But, there is a gray area in which the rule that states you may, but you need not, which causes confusion. It is up to you to solve this confusion in any manner you wish; toss a coin or talk to your spouse.

It is not for me to expound Christian scripture in a Catholic University, when Jesus said take up your cross and follow me,¹³ he was not just saying we should not do what is forbidden and we should not omit to do what is required.

¹¹ *Id.*

¹² Thomas L. Shaffer, *Maybe a Lawyer Can Be a Servant; If Not . . .*, 27 TEX. TECH L. REV. 1345, 1350 (1996).

¹³ See *Matthew* 16:24.

