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PERSONAL VALUES WITHIN OUR PROFESSION

GORDON L. GRAY*

Were I so inspired, *and* without a time deadline, I would prefer to write an article concerning the legal profession and personal values. Were I to do so, I might be accused of simply "transferring bones from one graveyard to another"[1] as J. Frank Dobie supposedly said in regard to research. Since it is not my intent to repeat what has been already written in the area of personal values and our profession, the law and the privatization of religion by the courts (and not just the Supreme Court), I opt to forego *extensive* research and to speak to the layman-lawyer-teacher, about philosophy concerning the place of personal values within our profession. Thus, I at least avoid the wrath of all Dobie fans.

In this way, I can and will interject my own philosophy from the standpoint of a lawyer and a Christian concerning the place of our personal values in the law. If we have no personal values, we are probably sociopaths (as it has been said that many of us are). I believe, however, that the vast majority of lawyers (whether they are religious or not) do have personal values concerning ethics, law and morality. As Immanual Kant wrote: "Two things fill the soul with ever new and increasing wonder and reverence ... The starry heavens above and the moral law within."[2] Lawyers are not excepted from this rule.

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[1] American author James Frank Dobie (1888-1964) wrote numerous non-fiction works on the culture and lore of the American Southwest, including Coronado's Children: Tales of Lost Mines and Buried Treasures of the Southwest; Guide to Life and Literature of the Southwest; Guide to Life and Literature of the Southwest.

[2] TREASURY OF PHILOSOPHY 643 (Dagobert D. Runes ed., 1955).

I. THE COURT'S "PRIVATIZING" OF RELIGION

Initially, I posit the idea that if the courts are "privatizing" or "marginalizing" religion (and religion has to include ethics and morals) then it is the duty of every lawyer, and the law teacher, to attempt to overcome this development in the government (especially in the Judicial branch). Certainly, this should be a duty of a Christian or religious lawyer of any faith as well as the duty of all lawyers.

There may be those who claim that privatization of religion and pushing it to the edge of our culture is within the purview of "conventional wisdom"; *nonsense*. Conventional wisdom does not exist. The term was coined by the American media and cannot be defined.

Further, no one can prove that American wisdom, conventional or otherwise, approves of or abhors what Professor Stephen L. Carter[3] calls "the culture of disbelief" in his marvelous book by that name.[4] If the thesis of an American marginalization stems from a so-called conventional wisdom, then it rests on shaky ground. The evidence points to a very opposite religious caring: The United States is still a very religious nation; the large majority of our citizens believe in a God; school prayer is favored by our population and a substantial number of people belong to (and a large number attend) a synagogue, temple or church.[5] Hence, though the courts may be secularizing religion, the American people are not supporting the trend, even if citizen "wisdom" claims this is happening. However, laymen are not lawyers, and ordinarily have little knowledge of the legal opinions handed down by our courts.

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[3] STEPHEN L. CARTER, Professor of Law, Harvard Law School, has written several books on morality and the law, including THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND MORALITY (1998).

[4] *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993). Carter argues that "[i]n our sensible zeal to keep religion from dominating our politics, we have created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them." *Id.* at 3.

[5] *See* Ari L. Goldman, *Religion Notes*, New York Times, Feb. 27, 1993, at 9 (reporting that 96% of Americans believe in God); GEORGE GALLUP, JR. & JIM CASTELLI, THE PEOPLE'S RELIGION 55 (1989) (reporting that one in five Americans describes himself as religious); *id.* at 30-31 (reporting that sixty five percent of all Americans belong to a church or synagogue and forty two percent attend services regularly); *id.* at 20 (stating that while "courts have consistently struck down efforts to restore [school prayer]. . . [s]urveys show that Americans have just as consistently favored some sort of school prayer."

II. THE COURTS' DISCOMFORT WITH DISTINCT EXPRESSIONS OF RELIGION

The problem for the courts is that they do not seem to know how to approach questions or issues concerning free exercise of religion. Cases involving religious establishment arise less frequently - the United States has no established church, and lately, has failed to covet one. Even so, the Establishment clause has been eroded away just as the Exercise clause.[6] This occurs when the courts take away a religious exercise that they consider to be unnecessary or unusual. These cases include unusual religious practices such as polygamy, snake worship, and the smoking of peyote in Native American religious ceremonies.[7] In these cases, an individual's freedom of worship is prohibited by the law; hence, in a sense, the state is altering, if not establishing a religion.

Perhaps, the greatest problem for the courts occurs when a particular religious exercise or practice should be "accommodated" by the courts even though the practice may be an unwise one. Accommodation can be defined as the granting of preferential treatment for certain religious practices because of the unique historical circumstances of the practice and the supposed importance of encouraging their continued existence. In the absence of a court-approved accommodation, apparently the only possible protection some religious groups, not in the so-called mainstream of religion, have against State action, where no accommodation is granted for that group, is the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.[8] However, this is a presumption on the writer's part, as no evidence of an adminicular nature will be presented here with the exception of the fact that Professor Stephen L. Carter expounds the same idea in the *Culture of Disbelief*.[9]

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[6] *See* CARTER, *supra* note 4, at 124.

[7] *See* Reynolds v. United States, 98 U.S. 145, 165 (1878) (holding that it is not unconstitutional to apply anti-polygamy laws to persons whose religion mandates polygamy, on the grounds that polygamy is "an offence [sic] against society"); Tennessee *ex rel* Swann v. Pack, 527 S.W.2d 99, 107 (Tenn. 1975) (upholding a statute prohibiting snake handling in the face of a constitutional attack by a religious group whose faith included snake handling, stating that while "[t]he government must view all citizens and religious beliefs with absolute and uncompromising neutrality," the practice of religion "is subject to reasonable regulation designed to protect a compelling state interest."); Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that a law prohibiting the smoking of peyote does not violate the Free Exercise Clause because it does not specifically target religious use of peyote). *But see* Church of the Lukimi Babulu Aye, Inc. v. City of Haileah, 508 U.S. 520 (1993) (holding that city ordinances prohibiting animal sacrifice specifically targeted practitioners of the Afro-Cuban religion Santeria and, therefore were unconstitutional).

[8] *See* CARTER, *supra* note 4, at 126-29 (discussing the Supreme Court's rationale in *Smith*).

[9] *See* CARTER, *supra* note 4, at 126-29. Carter discusses the Supreme Court's rationale in

Unfortunately, the "main line" Protestant churches are usually, and neatly, fitted into a religious accommodation spot so that most of their practices are allowed while the "lesser" denominations or religions, if there are such things, may find some of their exercises or practices stricken by the courts (i.e., polygamy, so called snake-worshipping and peyote smoking).[10] This trend shows an unfair preference for certain denominations. No doubt politics and political expediency play a role in matters of accommodation.

The foregoing statements in regard to our courts are there only to show, if they do, that the judiciary has a difficult job attempting to cut through the briar patch of the "free exercise" problem or, bluntly, they may not know what to do. In order to avoid confrontation, the courts continually pass the buck: not important, a problem for the secular authorities; not of such significance as to merit our protection; a political question for Congress, State legislatures or the people.[11]

III. LAW PROFSSIONALS MUST BE TRUE TO THEIR VALUES

I am hardly in any position to challenge the thesis of a great scholar with the stature of Father Andrew Greeley,[12] but, to be trenchant, there is no doubt that religion is being marginalized in America today, and if he challenges the premise of marginalization by the courts,[13] I must disagree.

Smith, supra note 8. Because the Court held that a law that infringes on a religious practice is not unconstitutional if it is neutral and is generally applied, a religious group must prove it is the target of the legislation in order to gain Constitutional protection. *See Carter, supra* note 4, at 127. Such protection would come from the Fourteenth Amendment. *See id.*

[10] *See generally Smith*, 494 U.S. 872 (discussing the Free Exercise Clause); *see also* CARTER, s*upra* note 4 (noting the application of the Constitution to the Freedom of religious practice).

[11] *See, e.g.,* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) (refusing to bar as unconstitutional government logging on the sight of a Native American cemetery where rituals were performed, on the grounds that the Native Americans' rights should yield to the governments to use its land as it pleases); Bowen v. Roy, 476 U.S. 693, 699 (1986) (stating "[t]he free exercise clause simply cannot be understood to require the government to conduct its own internal affairs in the ways that comport with the religious beliefs of particular citizens" in a case in which a two year old 's parents objected to the government's use of the child's social security number on the grounds that it robbed her of her spiritual power); Goldman v. Weinberger, 475 U.S. 503, 509 (1986) (upholding the right if the military to prohibit servicemen from wearing yarmulkes on the grounds that "[t]he desirability of dress regulations in the military is decided by appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment").

[12] Father Andrew M. Greeley, b. 1928, Roman Catholic Priest and Professor of Sociology, University of Arizona at Tuscon, best selling author of fiction and non-fiction.

[13] Father Greeley refuted the secularization theory in his book UNSECULAR MAN. *See* ANDREW M. GREELEY, CONFESSIONS OF A PARISH PRIEST (1896).

There is no real agreement concerning trends toward privatization of religion, even among legal scholars, and much less, the courts or the public. Collective public opinion may show that our citizens generally believe that the government is marginalizing religion in this country, and citizens do not welcome this trend. The prohibition of any religious practice by the State is a problem and fits in the marginalization category.

With this background one wonders what we, as lawyers and teachers, should do. It is quite obvious that we have a duty to interject our personal values into the system when the free exercise of religion is threatened by a vague, unknown animal called accommodation, and by inconsistent court decisions (thanks to the *Lemon* case[14]). *Lemon* gives the Establishment Clause no theory and the Supreme Court lays down no guideline for lower courts to follow concerning when the clause is violated.[15] This leads to inconsistencies[16] in the law and consistency is "[s]urely the very least that integrity demands."[17]

The inconsistencies shown by some of the appellate court decisions in regard to the accommodation of certain religious practices, thereby creating

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[14] *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). In the *Lemon* case, the Supreme Court considered Pennsylvania and Rhode Island statutes that allocated state monies to supplement the salaries of teachers in parochial schools. The majority set forth a three prong test for determining the constitutionality of statutes challenged under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither enhances nor inhibits religion, finally, the statute must not foster an 'excessive government entanglement with religion.' " *Id.* at 612-613 (internal quotes and citations ommitted). Approximately ninety five percent of schools that benefited under Rhode Island's statute were affiliated with Roman Catholic churches. *Id.* at 608. Over ninety-six percent of the schools benefiting from the Pennsylvania statute were church-affiliated, most of them Catholic. *See id.* at 610. The Court struck down both statutes on the ground that they "fostered an impermissible degree of [government] entanglement" with religion. *See id.* at 615.

[15] *See* CARTER, *supra* note 4, at 109-15. Carter asserts that, the *Lemon* test notwithstanding, "the Supreme Court has not really offered guidance on how to tell when the clause is violated." *See id.* at 109. Carter criticizes the Court's interpretation of the Establishment Clause, arguing that under the *Lemon* decision, "the clause exists less for the benefit of religion's autonomy than for the benefit of secular politics." *See id.* at 110.

[16] When it promulgates complex multipart tests for constitutional violations, the Supreme Court is almost always luckless, but the *Lemon* test has been extraordinarily unhelpful to the lower courts. Indeed, the courts have reached results that are all over the map-sometimes quite literally. One of the more interesting cases involved a rather bland "Motorists' Prayer" to God for safety that North Carolina printed on its official state maps. A federal court, missing the significance of America's civil religion, held the practice to be a violation of the Establishment Clause. Another federal court ruled that the clause prohibits religious group from petitioning the Congress for private laws (available to all other groups) in order to secure copyrights when they are unable to meet the statutory criteria. The list goes on and on, but *Lemon* remains. *See* CARTER, *supra* note 4, at 110-11.

[17] STEPHEN L. CARTER, INTEGRITY 48 (1996). "[A] moral understanding that has resulted from genuine reflection should certainly be applicable across very different cases." *Id.* at 47.

preferential treatment for certain practices, are often brought about because of the fact that the courts seem to be willing to follow the will of the majority of the religious denominations. It appears obvious that the majority of mainstream denominations would certainly be opposed to snake worship and the other odd practices mentioned herein. When the courts use this reasoning and follow a "majority rule" they seem to set aside or overlook the fact that the Establishment Clause and the Free Exercise Clause of the United States Constitution were created there for the specific purpose of protecting minority religious practices from the tyranny of the majority.[18]

I have the good fortune to teach an upper level law school course on the English Common Law. The course necessarily includes the role of the church in molding English law. I have added readings in philosophy, theology and morals and ethics, for the purpose of exploring with the students the role of these disciplines in the growth of our law. I have discovered that after discussions of common law forms or actions, the feudal system and the battle between king and lords and king and parliament, the classes welcome the fresh knowledge and study of history, theology, morals and ethics (Through the years, many of my students have had weak backgrounds in the study of history. For example, at the beginning of the course only one or two will have familiarity with the War of 1812). Suddenly, they are empowered with knowledge of Hesiod, St. Augustine, St. Thomas Aquinas, Plato, et al., and perhaps, learn to comprehend the difference between legal and moral wrongs. In this way, I feel these students begin to develop personal values that will play a critical role in the long, hard life of the practice of law. At the very least, I hope the students begin to develop values. I can open my arms but I cannot force them to step into them.

In the practice and teaching of law, it is virtually impossible to surrender our values. If we can do this, we may have had no values at the outset, but if we have personal values and do not follow them, then we destroy ourselves. I have mentioned Christian values unnecessarily, as persons of all faiths (or even without religious faith) have values. Christianity, then has only so much to lend to the subject. However, I am one who believes in a higher truth and reality and know that Christianity teaches a moral ethic.

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[18] *See, e.g.*, School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 223 (1963) (stating that the purpose [of the Free Exercise Clause] is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority"); Engel v. Vitale, 370 U.S. 421, 431 (1962) "When the power prestige and financial support of the government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to prevailing officially approved religion is plain").

In the history of the world there have existed some great men or, at least, well-known men who were religious leaders, lawyers and teachers commanding great respect. Yet, some of these men completely failed in regard to certain personal values in their own lives. I hesitantly name Mohandas Gandhi, lawyer and religious leader. Even though the Mahatma performed marvelous deeds (especially in the teaching of non-violent resistance), his personal values, exhibited by his actions toward his own family were less than admirable.[19] At times I feel more empathy for lawyer, Robert Ingersoll,[20] "the great agnostic," than for Gandhi. Ingersoll, as Abraham Lincoln, had integrity even though he followed no organized religious belief.

On the other hand, Adam Wirth, a "bad man" and international thief (the Napoleon of crime) whose career captured the attention of Sir Arthur Conan Doyle to the extent that Sherlock Holmes made Wirth one of his prey, had a rather finely honed moral code in regard to family and friends, but no respect for the law. He may have fashioned his own theories concerning the differences in moral wrongs and legal wrongs. Sometimes I wonder if Gandhi did the same.

Albert Einstein, like Ghandi, mistreated his family (including fathering an illegitimate daughter) though he was a respected and complicated genius. As Denis Bryan says, "his halo was slightly askew."[21]

Perhaps the lessons learned from the lives of Gandhi, Einstein and Wirth prove that personal values make no difference in the success of one's chosen profession. However, I doubt the validity of such a notion.

The lawyer's, as the thieve's or Rabbi's, own ethical and moral sense always remains, and as Benjamin Sells said in *The Soul of the Law*, "[h]ow we think about ethics cannot be divorced from how we imagine our own souls."[22] Further, if we value our souls, we should avoid trying to fit the

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[19] *See* MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (1957). Gandhi describes one representative incident involving his wife's cleaning of the chamber pot belonging to a clerk staying in their home. When his wife complained about the task Gandhi chided her. *See id.* at 277.

[20] Robert G. Ingersoll, American attorney and orator, (1828-1894). "The great agnostic" was born into an intensely religious household. *See* THE LETTERS OF ROBERT G. INGERSOLL, 10 (Eva Ingersoll Wakefield ed. Greenwood Press 1973). Ingersoll did not believe in the existence of God or in the divinity of Christ, yet "[f]or the man, Jesus, Ingersoll had 'infinite respect'. . . [Jesus] was a man who hated oppression; who despised and denounced superstition and hypocrisy; who attacked the heartless church of his time; who excited. . . hatred of bigots and priest, and who, rather than be false to his conception of truth, met and bravely suffered even in death." *Id.* at 230.

[21] BRYAN DENIS, EINSTEIN- A LIFE ix (1996).

[22] BENJAMIN SELLS, THE SOUL OF THE LAW (1994).

ethics of the world of big business into the world of the law.[23] I have used only one possible method of treating my subject. There may be others that are better.

To summarize, I do not believe in conventional wisdom, but in a collective wisdom. Conventional wisdom can be non-spontaneous, unoriginal and insincere, even though it may be the thinking of the majority. All wisdom, all wise people, should readily see the American trend toward secularization and/or privatization of religion and the failure of our courts to be consistent with integrity in past "accommodation" decisions. Hence, I desire more religious language and dialogue in our culture and in our law.

So believing, I have a duty to interject my personal values into our profession. If I were to do otherwise and reject a lifetime of religious and moral training, I would be a hypocrite and a Quisling to my own cause and to my profession.

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[23] *Id.*

TITLE INDEX TO ARTICLES AND REPRINTS

TITLE INDEX TO AUTHORS OF ARTICLES AND REPRINTS