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THE IMPORTANCE OF RELIGIOUSLY AFFILIATED LAW SCHOOLS

JAMES D. GORDON III^{*}

When I was a first-year law student, people used to write announcements on the chalkboards. One day on the chalkboard there was an announcement for the first meeting of a group called "Christians at Boalt." I went. About 10 to 15 other students also went, and during the next three years we formed a bond that still has meaning for me today. In many of our meetings we discussed the question whether a person can be a good Christian and a lawyer. Tom Shaffer has written that "[t]his proposal that a Christian be a lawyer hangs in the middle between wariness and prudence. It is a problematic thing, a thing that requires discussion."¹

Although we addressed the question many times, we were not able to advance the discussion very far. We did not have faculty members to guide us, to direct us to thoughtful readings, or to be role models, and we were too unfamiliar with the issues to make much headway on our own. Still, the meetings were

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¹ Thomas L. Shaffer, *Why Does the Church Have Law Schools?*, 78 MARQ. L. REV. 401, 405 (1995).

important; we began thinking about the topic, and we exchanged our views with each other. Perhaps most valuable was simply the reassuring realization that there were other people who cared about the same questions and who shared the same values and concerns.

What we discovered inside ourselves were needs that could be addressed by a religiously affiliated law school. Some students choose to attend church-related law schools precisely because of those needs, and some faculty members choose to teach at those law schools because they want to help students answer those questions. They want to teach in a school where they can talk openly about religious convictions and relate them to their views of the law and the roles that lawyers play.

For many religious people, being at a school where neither students nor faculty have to check their religious identities at the door can be a liberating experience. It permits them to be whole persons, to seek answers to questions that are off limits at other schools, and to try to address the most challenging and important professional question that they will ever encounter: how can I perform and even excel in my profession and at the same time be faithful to my religious beliefs?

It is difficult to explore these issues at state law schools. State schools typically prohibit the advocacy of religious values by the faculty in order to preserve a separation between church and state.² Interestingly, this prohibition is hardly ever acknowledged, except when it is violated, and then, to mix a metaphor, that's when the can of worms hits the fan. That's when the sacred cows come home to roost with a vengeance.³

Secular academics often set up a dichotomy of two kinds of universities. First, there are secular universities, in which academic freedom is absolutely unrestrained. The theory is that the absence of any limitation on individual academic freedom is essential to the very definition of a university and to the pursuit of truth. They contrast this model with that of religious universities, which sometimes prohibit faculty members from advocating positions contrary to church doctrine. The first school is free, and therefore a university; the second is unfree, and therefore

² See, e.g., *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (upholding University of Alabama's prohibition of professor's religious statements in class), *cert. denied*, 505 U.S. 1218 (1992).

³ See GYLES BRANDRETH, *THE JOY OF LEX* 227 (1980).

not a true university.

The truth is that both secular and religious universities have freedoms and limitations. At both kinds of universities I would hope that one could talk about almost any topic relevant to the subject matter. However, secular universities prohibit the advocacy of religious viewpoints by faculty members in the classroom, and some religious universities prohibit the advocacy of anti-religious viewpoints. Deciding which is the greater freedom depends on the value the individual faculty member places on the particular views he or she wishes to express. That is, in part, what attracts some faculty members to secular universities and others to religious universities.

But the fact remains that every university places some limitations on individual academic freedom in order to protect the institutional mission. George Worgul has observed that “academic freedom’ at any university—whether public, private, church-related or church-sponsored—is never unlimited or absolute. Every university has an identity and a mission to which it must adhere.... Freedom is always a situated freedom and a responsible freedom.”⁴

The real issues are: what limitations does the university place on individual academic freedom, and does the amount of academic freedom fall below some threshold deemed necessary for qualification as a university? Most would agree that a large amount of individual academic freedom is necessary, but precisely where does the boundary lie? These are difficult and sensitive issues, and the false dichotomy has the advantage of avoiding questions to which we are unsure of the answers. It also has the advantage of avoiding a discussion about which particular kinds of advocacy a university may exclude and still qualify as a university. When that discussion begins, the anti-religious bias of present-day academia might be laid out on the table. To some secular academics, that is a situation worth avoiding. Things can get uncomfortable when tables are turned.

In addition to the official limitations, most secular universities have strong cultural prohibitions against the advocacy of religious values. One political scientist observed that “if a professor proposed to study something from a Catholic or Protestant

⁴ George S. Worgul, Jr., *Editor's Preface*, in *ISSUES IN ACADEMIC FREEDOM* viiix (George S. Worgul, Jr., ed., Duquesne Univ. Press 1992).

point of view, it would be treated like proposing something from a Martian point of view."⁵

By contrast, at religiously affiliated law schools, it is often possible to talk openly about relevant religious issues in a way that is not possible at other law schools. The existence of these institutions contributes to pluralism in higher education. University of Chicago law professor Michael McConnell has observed that religious universities contribute to our diverse "ethical, cultural, and intellectual life."⁶

Given that professors at some religious law schools are permitted to incorporate religious issues into their teaching, do they do it, and if so, how? I suppose that there are as many answers to these questions as there are professors. At one end of the spectrum are professors who do not raise these issues explicitly in their contacts with students, either in or outside the classroom. However, the professors' religious views inevitably affect what and how the professors teach, how they view the world, and the kind of influence they have on their students.

Moreover, to the extent that the professors are known to be persons of religious conviction, they provide examples to the students of the proposition that intellectual achievement and rigorous analysis are not incompatible with religious faith, and that they can even complement one another. The power of this example cannot be overstated. A faithful faculty member shows her students in a concrete way that the integration of intellect and faith is possible, and she proves it with evidence no less convincing than the power of her own life. Former Notre Dame President Theodore M. Hesburgh said, "The greatest gift a [university or college] president can give his students is the example of his life."⁷

⁵ George Marsden, *Pluralism, Yes. Religion, No!*, 22 PLANNING FOR HIGHER ED. 58, 58 (1994) (quoting newspaper article criticizing speech given by author at gathering of American Academy of Religion).

⁶ Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 LAW & CONTEMP. PROBS. 302, 312 (1990); see also David Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 268-69 (1990). David Rabban argues that the greater latitude given to private universities under the Establishment Clause can improve our democracy as a whole because "[t]he resulting pluralism within the academic world may provide more tolerance for diverse and unpopular views than a rule that would subject all universities to the commitment to diversity of thought that the first amendment imposes on public ones."

⁷ Theodore M. Hesburgh, Speech at the 59th Annual Meeting of the American

Some faculty members are quite open about their religious beliefs. I know professors of national stature who have either begun or ended the semester with a declaration of their religious faith. Although students may have forgotten the legal doctrines studied in those classes, they have remembered the professor's statement of religious belief—even though it was not on the exam.

Others take an approach somewhere in the middle, including religious perspectives occasionally, when it seems natural. For example, one professor of real estate finance teaches that although a mortgage holder has the legal right to foreclose upon default, a charitable or Christian person might give the debtors some time to resolve their difficulties. Another professor correctly teaches students that the common law does not require them to disclose defects when they sell a used car. However, the professor then encourages people to reverse the roles. If you were the buyer, would you want to know? The golden rule offers sound advice: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them"⁸ One might add, from Leviticus, "Thou shalt not defraud thy neighbour, neither rob him"⁹ In contracts we learn that the common law rarely reviews the fairness of a bargain. To help students remember that there is a higher law, I like to quote Mormon pioneer leader Brigham Young. He said, "There are Elders in this Church who would take the widow's last cow, for five dollars, and then kneel down and thank God for the fine bargain they had made."¹⁰ In a society that increasingly defines its relationships in terms of legal standards, it is useful to point out that legal duties and moral responsibilities do not necessarily coincide.

Explicit references to religious views in the classroom generally appear only intermittently, when it seems appropriate. The study of law is largely the study of secular systems. James E. Faust, one of the General Authorities of the Church of Jesus Christ of Latter-day Saints, advised our students,

Do not expect your professor ... to concentrate his lessons out of the scriptures, although occasionally he may wish to do so. His obligation is to teach you the secular rules of civil and criminal

Council on Education, New Orleans, Louisiana (Oct. 7, 1976).

⁸ *Matt.* 7:12.

⁹ *Lev.* 19:13.

¹⁰ Brigham Young, 17 *JOURNAL OF DISCOURSES* 41 (1967).

law and matters that relate to them, such as procedures. Your obligation is to learn the rules of law and related matters. The whisperings of the Holy Spirit will no doubt help you, but you must learn the rules of law, using Churchill's phrase, by 'blood, sweat, and tears.' ... Just having a good heart does not get the job done."¹¹

Religiously affiliated law schools can also play a role in teaching professional values. The MacCrate Report says that law schools should teach students the values of the profession.¹² It identifies the values of competent representation, striving to promote justice, fairness, and morality, striving to improve the profession, and professional self-development.¹³ It states that "a lawyer should embrace 'those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have, throughout the centuries, been compendiously described as 'moral character.'"¹⁴ One might add other important values, such as self-discipline, work, perseverance, tolerance and love, courage, selflessness, service, faith, compassion, humility, and being a peacemaker. Of course, religious people have no monopoly on these values; the law professor who taught me the most about these issues is a person whom I believe to be an agnostic. However, religiously affiliated law schools can emphasize these values and relate them to the students' religious beliefs and moral traditions. This can help prepare tomorrow's lawyers, many of whom will also be tomorrow's leaders.

This message does not stop with the students. They will influence others, and the ripples in the pond can eventually reach large numbers of family members, friends, associates, clients, and others. In addition, when a religiously affiliated law school attains a reputation for excellence, it sends a message to other law schools and to society that it is possible to be academically excellent and solidly grounded in religious faith.

The message is also disseminated through the scholarship

¹¹ James E. Faust, *The Study and Practice of the Laws of Men in Light of the Laws of God*, CLARK MEMO., Fall 1988, at 16, 18-19.

¹² THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 135 (1992).

¹³ *Id.* at 140-41.

¹⁴ *Id.* at 213 (quoting *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring)).

that the faculty produces. This is true not only because of the quality of the scholarship, but also because of its content. When a faculty includes a number of people who take religious belief seriously, they are likely to discuss religious and moral perspectives among themselves, and to nurture one another in their scholarly efforts in those directions.

There is always the question of how religious a religiously affiliated law school should be. That is a question for each law school, together with its constituencies, to decide for itself. But I believe that to whatever degree a law school chooses to be religious, it should be religious without apology, confident in the knowledge that it will make a contribution that is both legitimate and important. One elderly alumnus, reminiscing about his experiences at the University of Notre Dame, said that perhaps his deepest feelings for the place were a reverence for what it represents.¹⁵

If a religiously affiliated law school can create an environment supportive of certain values, the flip side is that students might not be well exposed to contrary viewpoints. This is a criticism sometimes made of religious universities. I believe that this situation can be ameliorated by several factors: these schools can be diverse in ways other than religion, they can have some faculty and students who are not members of the sponsoring religion, and they can expose students to contrary ideas through teaching, discussion, and readings, and by bringing in outside speakers, panels, and visitors.

Moreover, most students are exposed to contrary ideas almost daily in the wider culture, both before, during, and after law school. The students' experiences in religious schools may be islands in a contrary sea, in which the currents of public culture are often hostile to their religious beliefs, and in which the students rarely hear thoughtful and informed views defending their religious positions on the issues of the day. Throughout their lives they feel the strong forces of the prevailing currents of the larger society; this is a brief opportunity to strengthen them so that they don't get swept along by the tides of an increasingly irreligious culture.

The counter-argument is that law school must prepare stu-

¹⁵ Edward Fischer, *Hooked on a Feeling*, NOTRE DAME MAG., Summer 1989, at 11.

dents to function in the larger society. However, religiously affiliated law schools do that. In most states, a law school will not survive unless it succeeds in preparing its students for the legal profession—unless its students learn the law, pass the bar exam, and have skills that are attractive to employers and clients. The issue is not so much whether religiously affiliated law schools will prepare students to function in the broader society, but whether they will prepare them to function as religious persons in that society. On that issue, religious schools have a unique contribution to make.

A survey of religiously affiliated law schools showed that only a few of the schools responding to the survey had given any explicit consideration to whether the curriculum should draw on religious values.¹⁶ Most schools appeared to leave consideration of religion to the individual professor.¹⁷ However, most left some room in the curriculum for reflection on religious teachings and the moral foundations of law, especially in courses such as ethics, jurisprudence, and family law, which lend themselves quite naturally to the consideration of religious issues.¹⁸ Most deans thought that their religious affiliation had a positive effect on the human relationships among the students and faculty.¹⁹

The survey asked whether in the deans' views the schools were drawing too much, too little, or just about right from their religious backgrounds. Different answers were given, "[b]ut the dominant answer was that these schools can and should draw more on their religious roots than they do now, especially by instilling greater commitment to ethical principles in the lawyers they turn out."²⁰ Most felt that "allowing greater vent to religious teachings would enhance the quality of the law school educational experience."²¹ One dean wrote, "The world is a more interesting place when people have beliefs, convictions, and a song to sing."²²

¹⁶ See Rex E. Lee, *The Role of the Religious Law School*, 30 VILL. L. REV. 1175, 1177-78 (1985). For a survey regarding prayer rooms at religiously affiliated law schools, see David L. Gregory, *Where to Pray? A Survey Regarding Prayer Rooms in A.B.A. Accredited, Religiously Affiliated Law Schools*, 1993 BYU L. REV. 1287.

¹⁷ See Lee, *supra* note 16, at 1178.

¹⁸ *Id.*

¹⁹ *Id.* at 1179.

²⁰ *Id.* at 1180.

²¹ *Id.*

²² *Id.* (quoting Dean Davis of the University of Dayton School of Law).

Legal education is more complete when it educates not only the mind but also the heart.²³ In Chaim Potok's novel, *The Chosen*,²⁴ Reb Saunders, a Hasidic rabbi, had a brilliant son named Danny. Danny had "a mind like a jewel," "like a pearl." Reb Saunders explained,

[W]hen my Daniel was four years old, I saw him reading a story from a book. And I was frightened. He did not read the story, he swallowed it, as one swallows food or water.... It was a story in a Yiddish book about a poor Jew and his struggles Ah, how that man suffered! And my Daniel *enjoyed* the story, he *enjoyed* the last terrible page, because when he finished it he realized for the first time what a memory he had. He looked at me proudly and told me back the story from memory, and I cried inside my heart.... "A mind like this I need for a son? A *heart* I need for a son, a *soul* I need for a son, *compassion* I want from my son, righteousness, mercy, strength to suffer and carry pain, *that* I want from my son, not a mind without a soul."²⁵

Reb Saunders feared that Danny would have a cold mind, a cruel mind—proud, haughty, impatient with less brilliant minds, unable to understand pain, indifferent to suffering. Therefore, he imposed upon his son a regimen of silence—he didn't speak to his son—so that Danny could learn of pain and understand the pain of others. In this manner, Reb Saunders hoped to teach Danny to suffer for his people, to take their pain from them, and to carry it on his own shoulders.

Good lawyers must have the skills required for professional competence. But this is not enough. They must know how to carry the burdens of other people on their shoulders.²⁶ They must know of pain, and how to help heal it. Lawyers can be healers. Like physicians, ministers, and other healers, lawyers are persons to whom people open up their innermost secrets when they have suffered or are threatened with serious injury.²⁷

²³ For a discussion of the benefits of a Catholic legal education, see Randy Lee, *Catholic Legal Education at the Edge of a New Millennium: Do We Still Have the Spirit to Send Forth Saints?*, 31 GONZ. L. REV. 605 (1996).

²⁴ CHAIM POTOK, *THE CHOSEN* (1967).

²⁵ *Id.* at 264-65.

²⁶ Notre Dame Law School conducted an experiment establishing that students are better prepared to practice law when they are trained ethically as well as legally. Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605 (1996).

²⁷ Bruce C. Hafen, *To Beginning Law Students on "Professionalism"* 5 (unpublished manuscript).

People go to them to be healed, to be made whole, and to be protected from harm.²⁸ These are large and important tasks, and they require all that lawyers have to offer. They require both good minds and good hearts—not only mental acuity and professional skill, but also compassion, righteousness, mercy, and strength to suffer and carry pain. That is what it takes to be a truly good lawyer. The world desperately needs truly good lawyers, and truly good law schools to teach them.

²⁸ *See id.*