Religiously Affiliated Law Schools: Macro-dynamics in Contemporary Culture

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I do want to begin at what I assume to be one of our principal concerns. That is, the character of the Christian university or Christian law school. I propose to examine several major themes or dimensions that I believe surround the whole issue today concerning the role of the religiously affiliated law school.

I share with many of you who have spoken the conviction that the core issues here are not primarily about accreditation. Those are symbolic issues. Those are illustrations of much larger dynamics. You probably have heard the story, it circulates in churches in two or three different versions, of the man who is leaving the plant and every day when he goes out he has a wheelbarrow with him, and some sort of rags in it. The authorities were convinced he was stealing something. And every day they’d stop him at the gate to go through and see what he had in the wheelbarrow. They’d look underneath it and search the rags. They were just absolutely convinced he was stealing something; but never could find anything. This went on for months and months. Finally, at some terminal event when it no longer made any difference, they asked him, “Look, we know you’ve been stealing something. What is it?” Of course, the answer: “Wheelbarrows.”

The story illustrates the potential for missing the obvious, and more central dimension. Our concern with accreditation runs the risk of missing the larger dynamic of what is really going on. We could win the little battles with AALS or some Rule 211(e) or something, and lose on more fundamental questions. So it’s those larger dimensions that I want to address.

The first one concerns the issue, touched on by others, of the crisis of identity in Christian schools, in religiously affiliated schools. What I perceive, as many of you have also commented, is a growing loss of confidence in the authority of the religious or Christian proclamation they have to make. In that sense, most of the injury we suffer is self inflicted. Sometimes it’s simply because of the tremendous need for these institutions to gain social or political acceptance, or donations from founda-

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tions or businesses that cause them to water down their unique character.

Other times, equally sadly, it's because of a loss of confidence in the truth of their moral and theological convictions. Other times, it's a theological error, in my perspective—the prevalence of a kind of schizophrenia that divides the sacred and the secular. Such a view sees the Lordship of Christ as having tremendous influence in areas of prayer meetings and gospel songs, but has almost nothing to do with the nature of a law school curriculum, the substance of law, or the questions of vocation and calling of students.

Schools so afflicted may take seriously their religious venture, but reduce it to courses on ethics or professional responsibility or a prayer breakfast. I had the occasion to attend two Catholic law schools. One of them, represented here, was Notre Dame. It was my experience that at Notre Dame the religious character of the institution was transparent, open, proud; in fact, I've told many of my friends I had more classes in the first year at the Notre Dame law school that began with prayer than in three years at the Duke Divinity School where I graduated. That seems to come as no surprise to those familiar with Duke. I attended another Catholic law school, however, in which its religious character was totally missing. There was not the slightest hint of any religious commitment in that institution. Not a single professor that I ever had at that institution had the remotest interest in religion, and most of them disdained it.

It seems to me that in American religious history, particularly in the evangelical tradition in which I have my roots, this schizophrenia, separating the sacred and the secular, has been too common, too easily a part of our subculture. The frontier did not encourage Christians to think about issues of public policy and law. Christians retreated into realms of piety alone, and forgot to engage the culture at large.

So my first concern has to do with this loss of authority. Now, you see, it seems to me a Christian institution might well have a conviction that there are some moral absolutes and some ultimate authority. It might assume that there would be a fundamental clash at times between its moral and theological convictions and those of the culture world. In fact, if it took Paul's counsel in Romans seriously, it would expect a very serious clash with the world, which was attempting to squeeze it into its mold, and this world would not even understand the blindness that it was in. So a Christian institution would not expect the "Cosmocrats," as Paul describes them in Ephesians and in Colossians, to affirm or even
understand the special character of the Christian understanding and mission.

A second critical factor in this larger perspective of what's going on is the loss of the sense of the moral and religious roots of law. It is the essence of Harold Berman's insight when he talked about a "massive loss of confidence in the law." For Christians, for those who come to law from an historical, or even just a generally religious perspective, the inquiry into religious aspects of law is not some mere appendage, some sort of curious hobby of the religious—an affectation of religious law schools. It is rather one of the central core jurisprudential questions that is inescapable. In fact, the problems today in law are partly an inadequate realization of these inevitably religious, ultimate dimensions of law. Law's tendency to retreat today to technique and procedure, is, in fact, a part of an unwillingness to engage in moral and value and ultimate conversations about law. The cultural patterns observed by critics like James Wilson, Richard Neuhaus, Harold Berman, Steven Carter, when applied to law, contribute to this failure of law to be addressed in our public institutions in a principled way.

It is inevitable that law reflects somebody's fundamental values. As one scholar noted, especially in areas like constitutional law, the language is like empty boxes that are going to be filled with underlying philosophic values. In that context, religious communities inevitably have something to contribute to that conversation and a legitimate role to play in the context of legal education.

The third general cultural pattern that troubles many of us, and is, I believe, part of what's going on is the legitimacy of the religious community's theological, constitutional, and political concern with intrusive regulations by government and other organizations over private institutions. It surely is ironic that a nation founded on concerns about abusive bureaucracies, whether government or private, should so easily be sliding into a regulatory arena that increasingly affects higher education in the United States.

In our tradition at Campbell University, as Baptists, we have special reasons to be nervous about bureaucracies and authorities and governments. Besides that, the risks to diversity, the risks to religion from oppressive governments, from oppressive agencies, is well established. How ironic that in an age when we're finally seeing the demise of the authoritarian states of eastern Europe and the Soviet Union we should find very little pause in our own country with the increasing nature of the regulatory state. Many who observe the role of accrediting agencies have warned of the potential abuses of the ABA and AALS accredita-
tion powers. The ABA and AALS are not a unique threat. Other accrediting bodies have shown their potential to squeeze compliance.

A prominent and highly respected West Coast seminary, for example, was initially denied accreditation for its graduate psychology program because it refused to teach that homosexuality was a legitimate alternative lifestyle. The potential for this kind of regulatory arena by both government and private organizations is a serious intrusion into the kind of autonomy in the university that has been part of its long and rich heritage.

Fourth, it seems to me that one cannot look at the aim of the pressures on religious law schools without recognizing it is part of a larger pattern of the diminished interest in vigorous religious freedom. We have seen a pattern in our nation, shifting from the affirmation of religious liberty in which religious liberty was celebrated and affirmed as a contributor to the body politic to a time when religion was tolerated in the way in which the majority might have tolerated the Jehovah's Witnesses: They pose a little inconvenience, ringing on your doorbell once in a while, but they're kind of quaint. And it's good to have the Amish around on vacation time, but nobody really takes them as having any serious contribution to make.

Increasingly, almost all religious groups have been seen by powerful interests in this sort of quaint Amish arena—tolerated, but not particularly valued. Religious ideas and themes are increasingly perceived as irrelevant and divisive. Now some of this plays itself out in constitutional jurisprudence of the free exercise clause, as has already been suggested by the comments of others. Religious liberty, for example, may be substantially diminished by simply defining religion in very narrow ecclesiastic or liturgical ways, so that when churches "do schools," they're not doing religion any more, and the protections of religious liberty are not applicable.

If that doesn't work, the certainly growing technique of finding self-executing, compelling state interests and least intrusive means seems to be common. The regulatory agencies, simply by announcing regulations, in effect create their own compelling interest and least restrictive means, therefore trumping the legitimate religious liberty interest that might have been applicable even under the older Sherbet test.

Quite apart, however, from the jurisprudence of the First Amendment, is what appears to be a social and intellectual ideology that's hostile to the notion of absolutes and convictions. It is the very thing Bloom suggested has been going on in the American university. A religious law school may well be seen by people described by Bloom as an institution
that has no real place in modern education. If, after all, the quest for truth has been abandoned in favor of relativism, then the religious school that takes seriously the notion that there are some moral absolutes and some authority and some truth will certainly not be welcomed into the community of universities.

The emphasis on the *ultimate* value of pluralism similarly works against the distinctive of religious freedom and religious distinctives. If pluralism is mandated not simply at the macro level, but at every institution, then the very definition of pluralism will assure its destruction—because all must look alike. A distinctive institution that contributed to overall diversity would be rejected because it was itself not "pluralistic." I'm reminded of the observation that pluralism is a word that a society uses on its way from one orthodoxy to another. But today's pluralism is often skewed—accepts all ideas, including the strangest ideas, except those ideas that happen to be linked with a traditional religious point of view. Those ideas are suspect, and excluded. The marginalization of religion to the fringes, to the closets, to the private arena, works clearly against any sense of a vigorous religious law school. I'm reminded of the observation of a columnist in the Wall Street Journal, who noted that in his observation with his own colleagues in the press that if he ever went to dinner with a group or was sitting around and having a conversation with some of his colleagues, and he mentioned a religious value or a religious principle—he wrote about this, "It was as if I had farted." He went on, "There was this strange silence. No one reprimanded me. No one said I had done something wrong. But there was sort of a consensus in the group I had acted socially inappropriately and people would turn the other way." Now, that is to a large extent precisely what is happening in a cultural context. A religious law school will be perceived by many precisely in that context.

Now lastly, let me suggest in this broad overview of forces and issues that the concern for the legitimacy of a religiously affiliated law school is not simply to allow religious schools to do their own thing. That would not be legitimate. And indeed I suppose we ought to affirm a maximum freedom for people with religious convictions to carry out those for their own integrity, for their own purity of conscience. But in the larger perspective Christians come to an arena like law not asking simply to be left alone. Not asking for the legal profession to allow us to be the Amish in the legal world and maintain our little carts. Rather we come to the arena of law and the culture suggesting that the perspectives and insights and moral principles and traditions that animate our points of view are legitimate contenders in the body politic for the health and character of
public society. We ask not only that we be allowed to articulate those in
our own privacy, but to genuinely compete in the marketplace of ideas,
in the struggles in our own culture. And we believe that those traditions
that have shaped our own religious life and our own institutions can
speak to the crisis of our day. In fact, how ironic it would be if in a day
in which the issues that our nation and world face in terms of biogenetic
engineering, the use of world resources, war and peace, and human
rights, there would be a cultural effort to silence the rich resources and
traditions of religious communities. Or to suggest that it would be inva-
lid for religious communities to try to create the kind of critical mass of
scholarship that can struggle with issues and put them into sharp relief,
and place them before the larger public community.

I was in the Republic of Georgia two years ago, at the time of great
transition there. And as I was talking with the Chief Justice of the Geor-
gian Supreme Court, we walked out of his office to a large hall. At one
corner there was a podium with nothing on it. He saw me looking at the
podium and said, “You know, until a few months ago, the bust of Lenin
was on that podium.” He said, “We’re now trying to figure out what to
put in its place.”

The comment was a sort of cultural message—a symbol, a parable, of
a crisis in much of eastern Europe and the former Soviet Union about on
what basis shall its education, its law, its philosophy, its schools, be built.
Having shattered one ideology, on what ideology can the culture be re-
built? The same issue is, I believe, a very lively one in our own culture.
On what will this society be built? Can you build a culture solely on
notions of individual freedom. That will not, I am convinced, sustain
culture. It will not sustain values. It will not sustain families, intellectual
life, or enable the maturity of persons. We are in a place today where it’s
not simply religious liberty that is at stake, but the culture that is at issue.

C.S. Lewis, writing about the tendency in the British educational sys-
tem to strip the schools from moral teaching on some sort of theory that
it would be inappropriate to impose on these young people the moral
principles of their parents, suggested by analogy how dangerous this was.
He said, “We castrate and bid the geldings multiply.” We remove the
very resources of life and health and vitality, and yet complain that we
lack heroism and moral strength in our society.

In the context of values and visions, the religious law school has a
vital contribution to make. George Orwell, who for so many years
bemoaned the religious dominance in Europe and yearned for the day
when the yoke of religion could be thrown off the British and European
culture, wrote later in his life about his dismay at the success of his
dream. At one point he said, “I thought of a cruel trick I once played on a wasp. A wasp had landed on my plate, and was sucking jam. I took my knife and I cut it in half. The jam still trickled out of its esophagus. The wasp didn’t have any idea of the dreadful thing that had happened to him until he tried to fly away.”