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Religious Law Schools: Tension Between Conscience and Academic Freedom

Kent Greenawalt

My comments this afternoon are responsive to John Garvey's Presidential Address on Institutional Pluralism at last year's meeting. The gist of his address, delivered gracefully, undogmatically, and persuasively, is that it may be desirable to have law schools that are devoted substantially to particular endeavors and points of view. Dean Garvey mentioned law schools that concentrate on teaching particular subjects, such as law and economics, or training for geographical areas, such as northern New York, or preparing for forms of practice, such as clinical work, or helping a particular group of potential lawyers, such as African-Americans, or reflecting a special point of view about a person's place in the world and its relation to law and legal practice, such as law schools with a substantial religious perspective.

I should like to draw attention to what is a nuance of difference, if not an outright distinction, between this last group of law schools and the others, one that both affects how we as members of the AALS should view arguments in their favor but also heightens the possible tension between a school's aspirations and the liberty of individual faculty members.

Dean Garvey treats the topic in terms of a balance of advantages, what diversity among law schools can contribute to the entire law school community and legal profession. No one doubts that law students as a group should be exposed to diverse perspectives and opportunities. Crudely stated, the issue is whether it is best to count on diversity within each of the schools, and in the communities and culture outside of law schools, or to encourage diversity fostered by individual law schools taking special directions. One might think, although Garvey does not, that given diversity in the broad culture, in undergraduate education, and within law schools of any substantial size, we have no need for schools setting out on their own focused missions, that is, focused on something other than providing the best possible broad legal education.

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The question Dean Garvey addresses is about overall good, analyzed without any presupposition about the truth of any particular religious or political viewpoint. But an organization like ours must also consider another perspective. What should be the response if individuals strongly believe they should undertake one form or another of special educational focus? An individual, or most members of an organization, might conclude that, on balance, some form of diverse education is actually undesirable, but that individuals should not be denied the opportunity to engage in that education if they feel strongly about it. The question would then arise what concessions from ordinary standards, if any, should be made so that those who wish can further such education.

I want to be clear that by approaching the subject from this perspective, I do not mean to indicate skepticism about the value of schools with special missions. In my own work over the years, I have benefitted greatly from contacts with law schools in the Roman Catholic tradition. The reason I approach the topic from the perspective of conscience is probably a consequence of my longstanding interest in religious liberty.

If we focus on a law school that would concentrate heavily on clinical education, or law and economics, we probably would conclude that, if students are forewarned about the school's emphasis and the school provides a sufficiently broad education so that students who discover that their interests or career opportunities lie elsewhere will have been adequately prepared, those who want to create such a school should be free to do so. It would follow that in initial hiring decisions, such schools should be able to give weight to interest in the subjects they wish to emphasize. What of tenured faculty already at the school, or faculty whose interests shift after they receive tenure? So long as these faculty members perform the teaching responsibilities to which they are assigned, I do not think they should lose their positions because they no longer are an ideal fit with the school's overall aspirations.

When it comes to aiding particular groups of the population, the AALS should consider whether the aid counters pervasive discrimination or helps perpetuate it. It would, for example, appropriately refuse to sanction a law school devoted to assisting white students to the exclusion of law students of color.

Schools that wish to convey and embody a religious or other ideological message are special both because they touch especially strongly on basic issues of conscience and can generate decisions about hiring and firing that contravene what we take as basic standards for most purposes.

I shall pass over one conceivable argument in favor of schools devoted to particular religious perspectives, namely that most leading law schools are so dominantly secular, with faculty members who by and large have little interest in religion, that religious law schools are needed to redress the balance. It may be that religious perspectives of various sorts would get swallowed up if

distributed evenly across law schools, but one could not reach that conclusion without some complicated empirical assumptions.

Many who wish to participate in a law school that concentrates on clinical education or opportunities for African Americans may feel that doing so is a matter of social conviction or conscience. In the same way, I believe that for those who wish to organize and to participate in law schools with a religious perspective, the endeavor is likely to be a matter of conscience or conviction. Law school education is one forum for communicating religious values they deeply believe in. For the rest of us, not feeling drawn to participate in such an endeavor, the question is not only what is desirable overall, or even whether to yield to a reasonable individual choice about what to do, but also whether to make an accommodation to conscience. We might think of the option of a genuinely religious law school as not unlike the kind of issue of accommodation that arises under the Religious Freedom Restoration Act. I am not sure how many of the creators and faculty of religious law schools consider their involvement to be a matter of religious conscience, or at least strong conviction, but the number is not small.

If one conceives of both universities and religious institutions as “separate spheres” each of which should be granted considerable autonomy by the state, an analogous question arises at the institutional level: how far should a body representing the broad principles of justice for law schools, such as the Association of American Law Schools, seek to accommodate the autonomy of individual law schools conceived as both religious and devoted to legal education? If we view this particular claim of diversity from the vantage point of accommodation, the claim in its favor seems particularly strong, independent of one’s evaluation of the net benefit to the legal community of having law schools with this special focus.

But with this strength comes a cost that does not exist for law schools that illustrate other forms of diversity. To create such a school requires selecting faculty members on the basis of their religious affiliation or at least their sympathy with the chosen religious endeavor. Yet selection for employment that discriminates by religion violates one of our fundamental norms of equality.¹

How serious a concern is this? Were there so many religious law schools of a particular type that job opportunities were extremely scarce for nonbelievers or members of different faiths, the concern would be very great. By contrast, were there outright, though unacknowledged, discrimination against seriously religious individuals at most law schools, occasional selectivity in favor of believers might redress an imbalance. I think the truth lies somewhere between these ends of the spectrum. I am unaware of any pervasive disadvantage in the teaching market for religious believers, although I think that outspoken defense of certain positions that are highly unpopular among most law school

1. See Bylaws of the Association of American Law Schools, Inc. § 6-3 (2008), available at http://www.aals.org/about_handbook_bylaws.php.

faculty and are commonly based on religious premises may well be a handicap. Relatively few law schools are strongly religious in the sense of wanting a particular affiliation or commitment from their faculty members. If those law schools do freely select on the grounds they like, that does not significantly affect (if it affects at all) overall job opportunities in law teaching. Such selection undoubtedly influences the distribution of opportunities. A non-Mormon has less opportunity to teach at Brigham Young than he or she would if Brigham Young were indifferent to religious affiliation. But the opportunity to teach at another law school may be marginally enhanced because an able Mormon has been drawn to Brigham Young.

I am not sure whether anyone has made a careful study of how many law schools do use religious criteria to choose faculty members and what the likely effect is on job opportunities overall, but such a study might influence how one views this issue.

Religious criteria may influence faculty at three career stages: initial hiring, the grant of tenure, and decisions about employment once tenure is granted. My present inclination about religion and faculty employment is toward these positions. Seriously religious law schools should be able to consider not only sympathy with their religious endeavor but also actual religious convictions and affiliations in initial hiring, and it should be possible for them to acquire the information necessary to make such choices.² To obtain this privilege, perhaps a school should have to present to the AALS a statement outlining its sense of mission and why it needs particular information to fulfill that mission. Thus, if it were enough for a Roman Catholic school that an applicant be sympathetic to its mission, whether or not a Roman Catholic, the school might not be allowed to inquire about actual denominational membership.

At the tenure stage, I think a school should be able to judge a faculty member's fit with its mission, based on his or her teaching and scholarship. Probably at this point the school should have to rely on what the teacher has actually done, without further inquiry into personal beliefs, attitudes, and affiliations.

Once a faculty member is awarded tenure, my sense is that the balance should shift. If he or she is teaching competently and doing the (minimal) amount of scholarship that may be required, the school should then take the risk about fit with mission. That is, those in authority should not be able to terminate a professor's employment based on a determination that he has drifted too far from the ideals of the school. Perhaps, however, a school that sets highly specific standards of behavior or affiliation and makes these a clear condition of continued employment should be able to dismiss a professor who definitely violates such standards. With this possible exception, I think

2. *But see* Association of American Law Schools, Inc., Executive Committee Regulations § 6-3.1 (2005), available at http://www.aals.org/about_handbook_regulations/php (allowing law schools with "religious affiliation or purpose to adopt preferential admissions and employment practices that directly relate to the school's religious affiliation or purpose").

judgments about faculty members based on fit with religious aspirations should end with the award of tenure. Part of my reason is that a school with a strong religious outlook should be able to cope with a limited number of faculty who may have drifted toward heretical beliefs and attitudes after acquiring tenure.

At present, my sense is not only that the schools should adopt the attitude I've suggested, but that the AALS should insist on it, with the sanctions that Article 7 of the Bylaws provides standing in the wings. This may be the present understanding. Section 4.3 of the Executive Regulations adopts the following Interpretive Comments issued in 1970 in regard to the American Association of University Professors' 1940 Statement on Academic Freedom and Tenure: "Most church-related institutions no longer need or desire the departure from the principles of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure."³ Firing a tenured professor because of a change in his or her religious views would be a departure. If "we do not endorse" also includes "we do not accept," dismissal would be a violation of the Association's standard of academic freedom.

In conclusion, apart from their value overall, the presence of law schools with a strong religious mission presents a significant issue of accommodation to religious conscience and a complicated question of the consequences for permissible standards of faculty employment.

3. *Id.* at § 4.3 (quoting American Association of University Professors, Policy Documents and Reports, 1940 Statement of Principles on Academic Freedom and Tenure 3 (AAUP Press, Washington, D.C., 10th ed., 2006)).