Religiously Affiliated Law Schools: Their Role in American Legal Education

James P. White
Let me begin by saying that I am very delighted to participate in this conference on religiously affiliated law schools. This morning we have heard two very thoughtful presentations, one from Rex Lee, and the second just delivered by Bob Destro. I would like to begin my remarks by taking a brief look at the history of legal education in the United States. Law schools, as we know them today, were created in the middle part of the nineteenth century. Indeed, the three earliest law schools, Yale, Harvard, and Transylvania, were, at the time of their creation, law schools of religiously affiliated colleges. In the latter part of the nineteenth century we saw a tremendous growth of American law schools. There were a number of law schools created as part of new state universities, sometimes as the result of the Morrill Act. Also, a number of religiously affiliated law schools were created, principally in urban centers. These religiously affiliated law schools provided an opportunity for entry into the legal profession and a means of upward mobility for America's new immigrants. Many of these new law schools were Roman Catholic in their affiliation, but if one looks at their early students, there was no discrimination in admission on the basis of religion. Indeed, many of the most prominent and illustrious graduates of these schools in their early days were not Roman Catholic.

Thus, religious institutions of higher education established law schools, but they established them perhaps with a different approach or mission than that of undergraduate programs. President Rex Lee quoted Judge John Noonan as follows:

I . . . insist that none of the special features [of a Catholic law school] is possible without a community of believers. A Catholic law school does not exist unless a substantial number of the faculty are in fact committed Catholics. Nor would such a faculty alone be able to sustain itself in isolation if the great part of the student body were not also Catholic. If a religious law school may not consciously discriminate in preferring coreligionists over

* Consultant on Legal Education to the American Bar Association and Professor of Law, Indiana University School of Law-Indianapolis.
others, it not only risks losing the community it needs in order to embody its spirit, it also risks losing that range of representatives who individually embody the faith.2

Let me contrast that with a site evaluation report of a religiously affiliated law school that I received in my office this week. In that report, the following statement was made, which was taken from a statement furnished by this law school and its parent institution:

The law school does have a religious affiliation. The university and the law school have a policy of not discriminating on the basis of religion in the administration of any of their educational policies, admission policies and programs, as well as employment related policies and activities. There is a full time, permanent director with responsibility for assuring that the non-discrimination policy is fully complied with. The on-site inspection revealed no evidence of any preference for anyone adhering to the affiliated religion except that the president of the university must be a member of the religious order sponsoring the university.3

How do we distinguish between the policy set forth by Judge Noonan, and the view of this well known law school, which is part of a university affiliated with a religious order?

Perhaps the best policy is to leave it to each law school to define itself and the role of its religious affiliation. Clearly, in my view, law schools with a religious affiliation must determine their own destiny. An accrediting agency should not attempt to dictate the extent to which their religious affiliation should guide their institutional direction. A law school must provide a sound legal education to enable persons to successfully enter the practice of law. That is our primary concern as an accrediting agency, and only if the religious affiliation of the school impedes or distorts that basic mission, should the accrediting agency have concerns about the school’s programmatic mission.

I would suggest that a law school with a religious affiliation should very properly give special emphasis to ethics and professional responsibility, as well as the understanding of a lawyer’s duties, responsibilities, and obligations in the profession. The ethics of those called to the bar must not be mere vision. Ethics are, and must be, real and ever present in every lawyer, in every act, and in every thought. And I suggest that


those schools with a religious affiliation have a special opportunity to instill a sense of ethics by utilizing their religious foundations.

Let me finally turn to a proposal to amend ABA Standard 211,4 a matter to which Professor Destro referred,5 and a document which is a part of the registration materials for this conference.

The Council of the Section of Legal Education and Admissions to the Bar, at its February meeting, recommended to the House of Delegates that Standard 211 be revised at its August 1994 meeting. Standard 211 provides that a "law school shall maintain equality of opportunity in legal education, without discrimination or segregation on ground of race, color, religion, national origin or sex."6 The amendment will seek to add the words, "or sexual orientation."7 The amendment will state in Standard 211(b): "[a] law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, sex or sexual orientation."8 The amendment says in 211(c):

The denial by a law school of admission to a qualified applicant will be treated as made upon the ground of race, color, religion, national origin, sex or sexual orientation if the denial relied upon is i) a state constitutional provision or statute that purports to forbid applicants to a school on the ground of race, color, religion, national origin, sex, or sexual orientation; or ii) an admissions qualification of the school that is intended to prevent the admission of applicants on the ground of race, religion, color, national origin, sex or sexual orientation though not purporting to do so.9

The Standard then refers to denial of employment. But 211(e) states:

This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff, before their affiliation with the law school, and (2) the religious affiliation, purpose or policies do not contravene any other

4. Memorandum D9394-54 from Dean James P. White, Consultant on Legal Educ. to the Amer. Bar Ass'n, to Dean of ABA Approved Law Schools, regarding "Proposed Revision of Standard 211 and Interpretations Thereto" (February 17, 1994).
7. Memorandum, supra note 4.
8. Id.
9. Id.
Standard, including Standard 405(d) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, sex or sexual orientation. This Standard permits religious policies as to admission, retention and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governs its application.  

At the time that the House adopts the amendment to Standard 211, there will be several interpretations adopted, and they will become effective simultaneously. The first one states:

[A]s long as a school complies with the requirements of Standard 211(e), the prohibition based on sexual orientation does not require a religiously affiliated law school to act inconsistently with the essential elements of its religious values and beliefs. For example, it does not require a school to recognize or fund organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school.

This debate has been conducted over a period of about three or four years within the American Bar Association. We have, as is our practice and requirement, distributed widely each version of the amendment to Standard 211. We have held public hearings and gathered responses. Roughly 65 law schools have a religious affiliation, depending on how one classifies them, out of the 176 approved by the American Bar Association. In addition, there are about 30 other schools whose parent institutions have a religious relationship, but that relationship has diminished significantly over the years. We heard from 15 of the 65 schools that have a religious affiliation. Most of the schools, despite years of debate, have not even bothered to give us their views as to this amendment of Standard 211. Nonetheless, due to a concern over the phrase “sexual orientation,” the council and the standards review committee, which were the groups charged with revising the standard, have tried to devise the amended standard and the interpretations in such a way as to provide a sense of satisfaction to schools with a religious affiliation.

10. Id.

11. Id.
I would hope that, in our administration of the accreditation process, we do not look at religious affiliation as a bar to accreditation, or indeed a hindrance to good legal education. Rather, as I said earlier, we should ask whether the school provides a sound legal education for its students, and whether it trains them and educates them to successfully enter the practice of law. That is what we are concerned about in the American Bar Association and the accreditation process.

Religiously affiliated law schools have, for 175 years, been an important part of American legal education. They have and will continue to contribute much to further justice in American society through improving legal education.