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### Symposium: Mission of a church-Related Law School - The Fundamentalist Tradition

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## THE FUNDAMENTALIST TRADITION

JOHN EIDSMOE\*

Fundamentalist Christianity does not have an extensive tradition at law schools, but I want to discuss what I see as some of the distinctive characteristics of a church-related law school from a Fundamentalist standpoint. When Professor Meyer asked me last fall if I would be willing to speak at this dedication, he asked me to represent the viewpoint of Fundamentalist Christianity and said that he would be presenting the Lutheran viewpoint. I said that I would be delighted to do so, but that I myself am a Lutheran. I consider Martin Luther with his emphasis on *sola scriptura* (only scripture), *sola gratia* (only grace), and *sola fide* (only faith),<sup>1</sup> to have been the greatest Fundamentalist of all times.

What are some of the distinctive characteristics of the church-related law school? Obviously, one tradition that Valparaiso University has adhered to is a dedication to excellence. Certainly Valparaiso has lived up to that tradition. But the fact is, there are plenty of excellent law schools in our nation today, and they are producing plenty of excellent lawyers (some will say too many). So the question that I would ask is, "What does Oral Roberts University, or CBN University, or Valparaiso University have to offer that Princeton, Columbia, Stanford, Harvard, or the University of Chicago cannot?" We might ask the question in this way: "What can the Valparaiso graduate take away from this law school and look back upon twenty years later and say, 'This is what I received at Valparaiso that I could not have received anywhere else?'" Or, let us put it still another way, "Why should the Church of Jesus Christ, regardless of which denomination, spend extensive resources of manpower and money — money that is not obtained from the taxpayers but that has to be raised from the voluntary contributions of its adherents — for the purpose of legal education, if its students can get that legal education just as well at a secular institution?" What is there that is distinct about a church-related law school? Or what *should* there be that is distinct about a church-related law school?

I would like to suggest eight distinctive characteristics to you. Let me begin with one distinction that is not unique to a church-related law school.

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1. See LUTHERAN CYCLOPEDIA 726 (E. Lueker ed. 1975).

A church-related law school should excel in training lawyers to be servants of society. The plain fact is that all too often lawyers are not regarded as public servants. They are regarded as takers rather than givers. I have a close friend who is a doctor, and I cannot understand why doctors would rather be performing surgery when they could be testifying in court. He feels differently, and he told me what he thought was the latest lawyer joke: Do you know what is black and tan and looks good on a lawyer? The answer is — a doberman pinscher. My response was that doberman pinschers do not bite lawyers, and the reason is professional courtesy. I also told the doctor that one of our students at Oral Roberts University Law School had been shot in the head and had to have two-thirds of his brain removed. He had to drop out of law school and enroll in medical school instead! But jokes like this about lawyers abound, and there is probably a grain of seriousness behind them. The fact is, lawyers are not regarded as public servants. This image of lawyers is not entirely justified. The average lawyer probably spends as much time in *pro bono* service as just about any other professional that we have today. But we need to do more in training lawyers to be servants of society.

As a capitalist, I see nothing wrong with lawyers getting rich, but we should look on our cases (and we should train our students to look on their cases and their clients) not just as opportunities to make a living but as opportunities to serve. This is true whether the client is a doctor who is being unfairly cheated by a deadbeat patient, or a patient who is a victim of malpractice; or a landlord who is being swindled by a tenant, or a tenant who is being swindled by a landlord; or a crime victim who needs justice, or a criminal defendant (guilty or innocent) who needs representation. We should look upon our profession as a field of servitude and as an opportunity to be of service to our fellowmen and to the society of which we are a part.

Secondly, I think we should, as a church-related law school, train our students to be servants of the church. The fact is that in the increasingly complex legal society in which we live, churches have more and more legal problems. I think you will find as you work with churches that church legal affairs are often handled very sloppily. Possibly, the reason is that churches are staffed to a large extent by volunteers who are not being paid for their efforts. Possibly, we have a tendency in many religious societies today to equate sloppiness with spirituality. Regardless of the reason, you will find that very often churches are in desperate need of legal expertise to get their affairs in order.

As I was flying here from Tulsa yesterday, I tried to enumerate some of the cases involving churches that I have had in recent years. Some of these involved very traditional things such as incorporating churches or preparing warranty deeds or quitclaim deeds. Some cases involved issues of whether or not churches can have Bible studies in local homes where this

practice may conflict with the local zoning laws, or have a church-related school in their church building if the area is not zoned for schools. I have been involved in legal disputes between churches and church architects or church builders concerning questions about plans for a parking lot, as well as questions about whether churches and church-related ministries are required to pay workers' compensation or unemployment compensation. One case that I had involved an Assembly of God church that owned a building and parking lot that it had rented to an organization that was using the building as a coffee house. That organization later subleased the property to a tavern, and the litigation involved the church's legal right to stop the tavern from serving liquor on property that belonged to the Assembly of God church. I had another case involving a church that six years earlier had held a meeting in order to buy new property but later discovered that the church may have failed to give its members the required meeting notice that a nonprofit corporation must give. Minnesota law contains specific procedures for a nonprofit corporation to procure new real estate, therefore the question of the transfer was in legal jeopardy. As you can see by these examples, a church lawyer faces many difficult questions; I have only begun to scratch the surface. I would hope that the church-related law school would take very seriously the mission of training lawyers to be servants of the church — both in the area of motivating students to devote a portion of their time to church service and legal matters, and also in the area of training lawyers to have legal expertise in these particular areas.

A third distinctive characteristic is in the area of legal ethics. This has already been touched upon by our previous speakers, so I am not going to dwell on it at length except to say that our canons of professional responsibility in the legal profession are based in large part on the original legal treatise on legal ethics written in the 1800s by David Hoffman,<sup>2</sup> a professing evangelical Christian who based his legal ethics largely on the scripture. In regard to legal ethics, personally I probably have fewer problems with the canons of ethics than many others in the Fundamentalist camp, because I am committed to the adversarial system of justice. A system in which there is an advocate zealously fighting for each side is in general, I think, the best means ultimately to arrive at truth and justice. But I see the canons of professional responsibility not as the end of legal ethics, but as the beginning. I would urge the church-related law school to train its students to look beyond the canons of ethics to where the canons may be sufficient but do not go far enough, and to encourage the lawyer who graduates from a church-related law school to go a step further.

As a fourth distinctive characteristic, I would urge the church-related law school to train its lawyers to be conciliators of the problems of modern

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2. D. HOFFMAN, *AMERICAN LAW* 720-75 (1836 & reprint 1972).

society. Chief Justice Warren Burger once made the statement that “lawyers can be healers.” Lawyers can do a lot to heal the problems of society. Unfortunately, all too often we in the legal community do more to exacerbate legal problems than we do to heal them. All too often the motto of the law firm is, “let’s file suit and then we’ll talk about settlement — maybe.” Well, now I am going to do something that might be unpardonable sin in many law schools; I am going to quote to you for just a moment from what today is possibly the most censored book in America — the Bible. The Apostle Paul in First Corinthians says:

Dare any of you, having a matter against another, go to law before the unjust, and not before the saints? Do ye not know that the saints shall judge the world? and if the world shall be judged by you, are ye unworthy to judge the smallest matters? Know ye not that we shall judge angels? how much more things that pertain to this life? If then ye have judgements of things pertaining to this life, set them to judge who are least esteemed in the church. I speak to your shame. Is it so, that there is not a wise man among you? no, not one that shall be able to judge between his brethren? But brother goeth to law with brother, and that before the unbelievers. Now therefore there is utterly a fault among you, because ye go to law one with another. Why do ye not rather take wrong? why do ye not rather suffer yourselves to be defrauded? Nay, ye do wrong, and defraud, and that your brethren.<sup>3</sup>

How many of you have ever read those words or given that type of advice to a friend? How many of your senior partners would approve if you did? And yet, the word of the Scripture is quite plain: believers are not to go at law against unbelievers. There are several suggested reasons for this message. Calvin’s estimation of this passage is that the Roman court at the time required oaths to pagan deities. Others have suggested that the basic reason is that it is a bad testimony for the church to air its dirty laundry before unbelievers. Still others suggest that the reason is that we are capable of judging angels, as Paul says, and therefore, a fortiori, church elders can judge the problems of this life as well. The point is that at the very least this entails the responsibility to try to work out disputes among ourselves rather than constantly going to court.

A fairly direct application of this passage would be between believers. In Romans, Paul also says: “If it be as possible, as much as lieth in you, live peaceably with all men.”<sup>4</sup> Again, it is obligatory to try to work out our disputes. The Christian Legal Society heads up a subsidiary organization

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3. I *Corinthians* 6:1-8 (King James).

4. *Romans* 12:18 (King James).

called the Christian Conciliation Service with chapters in many parts of the United States that try to do exactly this. I am working on a dispute right now between two Christian organizations before that group. I think we should all take this responsibility much more seriously, especially in a church-related law school. We should encourage our law students to try to heal disputes. There are certainly going to be times when we have to go to court, but we should try to heal disputes whenever possible.

Another distinctive characteristic is that in addition to being conciliators, Christian lawyers should be gladiators for the Christian community. Sometimes we are to be healers, but there comes a time when we need to be gladiators. As church and state grow in influence, more and more often they are going to come into conflict. At the time that this nation was founded, or at least at the time George Washington became president in 1789, the President had a total of three hundred federal civilian employees working under him. As to how he governed a nation of three million people without the use of WATS lines, word processors, Lear jets, and the other things we think are so essential for effective administration today, there can be only one answer — at that time the federal government, and to some extent the state governments as well, generally stayed out of people's lives. Today we have over three million federal civilian employees. Each of them is involved in some respect in regulating the affairs of this nation; the state and local governments, of course, have grown as well. I think that this is the reason that church and state are coming into greater conflict today than they ever did before; both inevitably are competing for a place in the lives of our people.

I think that it is incumbent upon church-related law schools to train lawyers to represent the church and to represent people as part of the church in this area. What is the role of religion in the public arena? The proper role includes the equal access issue and many others. If our public arena, including public education, is to be completely religion-free or value-free by removing traditional religions from the public schools, are we in effect establishing the religion of Secular Humanism? One judge in Alabama seems to think so.<sup>5</sup> There are many, many issues to be resolved in this area, and I would hope that the church-related law school could devote its scholarship and resources to motivate and to train lawyers who are interested in pursuing this area as gladiators for the church.

Still another distinctive characteristic that I would suggest — one that is definitely not distinct to a church-related law school but one again in which the church-related law school should excel — is an appreciation and respect for the constitutional system of government of the United States.

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5. *Smith v. Board of School Comm'rs of Mobile County*, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

Contrary to what often is being expressed today, our constitutional system is based to a large extent upon the Judeo-Christian tradition. I know that it is being said today that the founding fathers of this nation were Deists rather than Christians. My own research tells me that that is not the case. My book deals with that in great length.<sup>6</sup> But Dr. William Bradford of the University of Dallas, in his book *A Worthy Company*, goes through the church membership of the fifty-five delegates to the Constitutional Convention.<sup>7</sup> I find that out of these fifty-five delegates, some twenty-eight, just over one-half, were Episcopalian. In addition, eight were Presbyterian, six were Congregationalist, two were Lutherans. There were two who were Dutch Reformed. There were two Methodists, two Roman Catholics, and one whose religious preference Dr. Bradford could not determine. This leaves a total of four who were possibly Deists, though even that is questionable. Dr. Donald Lutz, in a recent article, examined fifteen thousand writings of the founding fathers from about 1760 to 1805.<sup>8</sup> His purpose in examining these writings was to identify quotations to find out who influenced the founding fathers. Who were they quoting? Out of the 3,154 quotations that were identified, around thirty-four percent of them came from the Bible — and the Book of the Bible which was quoted most frequently was Deuteronomy, the book of the law. The then contemporary writers whom they quoted were first Baron Montesquieu, a conservative Catholic; closely behind him was Sir William Blackstone, a conservative Anglican; and a distant third was John Locke, a Christian, though not entirely orthodox. They quoted anti-Christian writers like Hobbes, Hume, Voltaire, and Rousseau, but much less frequently, and often in a very negative manner. The point is that the founders identified to a large extent with the Judeo-Christian tradition, and when they wrote the Constitution, they had a Judeo-Christian view of human nature in mind. Alexander Hamilton wrote in *The Federalist*: “[W]hat is government . . . but the greatest of all reflections on human nature?”<sup>9</sup> There he described his view of human nature:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and . . . next . . . oblige it to control itself.<sup>10</sup>

The founding fathers were dealing with the basic question. They recognized

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6. J. EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION* (1987).

7. W. BRADFORD, *A WORTHY COMPANY* (1982).

8. Lutz, *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984).

9. THE FEDERALIST No. 51, at 356 (B. Wright ed. 1966) (A. Hamilton).

10. *Id.*

that there are God-given natural rights, certain natural liberties that people enjoy. They also knew that government power is necessary to restrain human sin in society. How do you reconcile that problem? You start with the fact that men are sinful, and therefore government is needed to restrain them; secondly, you face the fact that rulers are also sinful, and therefore we cannot give them absolute power or they will become tyrannical. The solution the framers of the Constitution came up with is several-fold. First of all, government has only limited, delegated powers. Secondly, the government consists of separated powers between legislative, executive, and judicial branches. Thirdly, checks and balances exist between those powers, an idea that seems to be the unique contribution of the President of Princeton, the Reverend John Witherspoon, as he shared it with his students, nine of whom (including James Madison) were among those fifty-five delegates. And finally, the concept of natural rights is specifically provided for in the Constitution and Bill of Rights, and generally recognized in the Ninth Amendment. The respect for this constitutional tradition should be a special role of the church-related law school, because even though our Constitution does not expressly mention Christianity or Judaism, the basic world view of our Constitution emerges with a Judeo-Christian tradition.

A seventh distinctive characteristic is a commitment to truth and justice. If I were to make that statement before a church group, I would probably be asked, "How trite can you possibly get?" And yet, these are controversial, possibly even forbidden, subjects in many law schools today. When Oliver Wendell Holmes was sworn in as a justice of the United States Supreme Court, a very well known judge was present, Learned Hand. When Learned Hand approached Holmes to congratulate him on becoming a Justice of the Court, he said to Justice Holmes, two simple words: "Do justice." Holmes responded, "That is not my job. My job is to play the game according to the rules."<sup>11</sup> Is there a difference? I think there is. Law is primarily concerned with rules and procedures. Justice is concerned with truth and fairness. I think possibly that the conflict between law and justice might be well illustrated by the recent case out of Chicago of Gary Dotson, the young man who had been convicted of rape based on the testimony of a young lady. He served six or seven years in prison, and sometime after that the young lady had some form of religious conversion and (if her testimony is to be believed, and I am inclined to believe her) she became convinced that she had done wrong by accusing him, because she claims that she had fabricated the accusation to cover the fact that she had been involved with her boyfriend. After her conversion, her conscience bothered her, and she told the nation that she had lied and that the rape had not really occurred at all. It is quite interesting to see the reactions. The general public seemed

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11. H. SHRIVER, *WHAT GUSTO: STORIES AND ANECDOTES ABOUT JUSTICE OLIVER WENDELL HOLMES* 10 (1970).

to rally behind Dotson, an apparently innocent man who had been wrongly convicted and who, therefore, should be released. The legal community seemed to rally behind its own legal system and generally took the position that Gary Dotson had been afforded a full and fair trial; he had had the right to counsel, the privilege against self-incrimination, a jury of his peers, and the presumption of innocence, all the protections of the legal system. The jury had found him guilty; the appellate process was completed; so Dotson was guilty, and that is all there was to it. Case closed. But the public as a whole seemed to be bothered by one minor detail: apparently he did not do it. This illustrates the problem — we have a legal system that is concerned about law and a public that is concerned about justice.

My point is simply this: the purpose of a legal system, the purpose of rules of procedure, and the purpose of the rules of evidence is to do justice. The purpose of the rules of evidence (hopefully at least, and in most cases I think it works pretty well) is to discover the truth. It is said sometimes that law is not primarily concerned with the truth. I emphatically disagree. I believe our rules of evidence generally are designed to lead to the truth. That of course is not their only purpose. We do not use a means of deriving the truth that violates fundamental human dignity, but the truth is their essential purpose. We allow certain types of evidence because these tend to facilitate the process of finding the truth. We do not allow others — like many forms of hearsay or inflammatory statements — because these tend to detract from the truth-seeking process. My point is that law should be concerned with justice and justice has to be based on the truth.

A final distinctive characteristic that I would suggest is a respect for higher law. Even those of our founding fathers who were not Christians still believed in higher law. Thomas Jefferson, a man who probably was not a Christian although he called himself one, a man who many times was thought of as a Deist although he is probably best described as a Unitarian, still wrote in the Declaration of Independence about “the laws of nature and of nature’s God.”<sup>12</sup> There is some form of higher law by which man’s law is to be judged. Law is not simply law because the highest human authority has said so. If that is the case, what is the basis for saying that any law is unjust? What is the basis for any form of civil disobedience except that we are powerful enough, or tricky enough, that we can get away with it? Unless there is a higher law by which man’s law is to be judged, there is no basis for saying that any law is unjust or that any civil disobedience is justifiable. Where can there be a higher law, if it is not a law that comes from a higher source than man — The Law of God?

How do we implement these distinctive characteristics of a church-re-

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12. Preamble to the Declaration of Independence, *quoted in* C. Becker, *THE DECLARATION OF INDEPENDENCE* 5 (1942).

lated law school? I would suggest to you that there are perhaps many ways that this can be done. I certainly would not say that the way it was done at Oral Roberts University, or the way it is presently being done at CBN University, is the only possible way. I would urge you again to dare to be distinct. I would suggest to you that there are many ways of producing quality education. I think that the diversity we have at law schools is a great thing, but in some ways law schools are like shopping centers. You can go to a shopping center where you will find a great deal of diversity. You will find a jewelry store, a general merchandise store, a men's clothing store, a women's clothing store, and perhaps a sporting goods store. You may find a hardware store, a fancy department store, and perhaps a variety of other stores. But it seems that almost every shopping center is diverse in essentially the same way. Go to a shopping center in Chicago, Tulsa, Los Angeles, Miami, or New York, and you will find the same Zales jewelry, the same Target or K Mart, the same Brooks Brothers. Essentially the same kind of diversity is everywhere. Should all church-related law schools simply be like each other as are shopping centers? Or should it be a shopping center that is especially unique, that is distinct in and of itself? I would urge you again to dare to be distinct. Some of you might ask, but what about ABA standards? Certainly, we need to consider ABA standards. The American Bar Association has wisdom that has been accumulated over many, many years about what works and what does not work in an effective law school. New law schools might be well advised to pay more attention to those standards than we did. But I would say ultimately that these standards are to be our servants, not our masters. They are to be guidelines, not black-letter rules. They should aid the process of producing quality education, rather than interfere with it. I urge you again to dare to be different.

I would like to say one thing more. I urge you to pay careful attention to the possibility that God speaks to our legal system today, that what God has to say is relevant to our legal system today, and that one way in which God speaks to our legal system today may be through the scriptures. I would like to quote to you a leading fundamentalist who has this to say: "Above all things, the principal and most general subject of study, both in the higher and lower schools, should be the Holy Scriptures. . . . But where the Holy Scripture does not rule, I certainly advise no one to send his child . . . I greatly fear that schools for higher learning are wide gates to hell if they do not diligently teach the Holy Scriptures and impress them on the young folk."<sup>13</sup> I urge you to consider these words, for the author is not Jerry Falwell, Pat Robertson, or even Jimmy Swaggart. The author is my favorite fundamentalist, Martin Luther.

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13. 1 WHAT LUTHER SAYS 449 (E. Plass ed. 1959).

