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# RISKING THE TERRIBLE QUESTION OF RELIGION IN THE LIFE OF THE LAWYER

*Burnele Venable Powell*

UNLESS there be doubts, let me say at the outset that as a Unitarian I am proud of the essentially heretical view that I take toward religion and the role religion plays in my life as a lawyer. Simply put my apostasy holds that whatever view one takes of GOD is right for you and not subject to rational contradiction.<sup>1</sup> Thus, it is negation enough of any conflicting view of GOD for a person simply to *know*: GOD told me that this is so.

My wonder, however, is that a similar respect for the religious views of others is not universally shared. It surprises me, too, that opposition to such a belief is so often the posture of those who would otherwise hold themselves out as the most fervently religious. To them it is as if the truth of my conviction requires something more—a demonstration, for example, that I am not in need of rescue from some error of logic or, conversely, that I have not too heavily relied upon logic. Ultimately though, the assertions of the skeptics are traceable to a fundamental misconception that religious belief is something that we can debate in the way one might debate the weight of evidence before a jury or an issue of public policy.

Thus, although the experiences of a lifetime tell me that, as a Unitarian, I am incapable of perceiving or structuring my life in any way other than presently; I am aware that just as staunchly as I am prepared to proclaim consonance with GOD, I will nevertheless confront skeptics prepared to explain precisely why my religious beliefs cannot be so. Either I do not *truly* understand the nature of my beliefs; am not fully sensitive to the implications of such beliefs; or, worst of all, I am lying. Still, the truth that my belief in a highly personal and individualized communication between the existential self and GOD is not only what I believe; it is what I have believed for a very long time. Furthermore, it is out of this continuing dialogue that has come not only my certainty about the nature of GOD, but also confirmation that the more I can recognize what is human in me (and in all around me), the more I am also able to recognize GOD.

Two important consequences of this belief are relevant to this limited inquiry into the role of religion in the life of the lawyer. The first

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1. This is not to say that there cannot be discussions about the nature of systems—whether they are rational, logically consistent, economically efficient, sexist, or any of a variety of other concerns. Nor do I preclude similar types of discussions among those who share a common religion. Other than for mutual edification, however, my point is that there is no rational basis on which holders of one religious view can fault holders of a different religious view. From the standpoint of moral belief and the religious expression of those beliefs, GOD speaks perfectly to every religion.

consequence relates to what I here call voice—the right to express one's religious views. The second is a liberty related to that right, the freedom to communicate. A few words about each are necessary to the emergence of an understanding of why I, both, reject the notion that we have excluded religion from the public forum and endorse the apparently contradictory proposition that, even if some isolated instances suggest the appearance of exclusion, such exclusion—unintentional in impact and insignificant in consequence—is good and ought to be welcomed, especially by religiously committed lawyers. Accordingly, this essay is about the necessary preface to any meaningful discussion of the role of the lawyer who would commit to the public forum. As already suggested, it rests upon a major distinction between *religious voice* and *religious communication*. More specifically, I urge that because *voice* and *communication* speak to different needs of the lawyer who would have religion in his life, we should pursue them with different expectations. I hasten to add, however, that given the necessity to choose, the religious community should always concentrate upon the protection of voice, even at the risk of losing communication. Upon consideration of the role of religion in the life of the lawyer, therefore, I also conclude that whatever may be the desire of the religious person to be heard and appreciated in the public forum, the lawyer who would be religious must favor the right to speak, even if that means relinquishing the chance to be understood.

Let me begin, therefore, with my conclusion: The role of religion in the life of the lawyer is to serve as the standard by which to test personal values against the challenges of an impersonal world. This role permits no room for the subordination of religious values to other concerns. Indeed, it does not permit the ultimate possibility of other values. It permits consideration of other values only for purposes of determining whether we might reconcile them.

Nor can the circumstances in which religion might play a role be anticipated. Although here we emphasize the moral learning that religion can offer a lawyer, there is no reason to suppose that a lawyer might not take inspiration from religion's contributions in a host of other realms: literature, history, sociology, poetry, and song, to name a few. A dramatization of religion's serendipitous capacity to play a role in the lawyer's life was recently and quite strikingly made in the film *Amistad*.<sup>2</sup> In a pivotal early scene, the lawyer, John Baldwin, is

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2. *Amistad* (DreamWorks 1997). This film, directed by Steven Spielberg and written by David Franzoni, is an historically based account of abolitionists who free African captives. In 1839, the African captives killed their captors aboard the Spanish slave ship "Amistad" and were subsequently taken into custody in Connecticut waters. After being freed by the district court, their case was ultimately argued on appeal by John Quincy Adams in the Supreme Court. There, Adams convinced the Court to affirm the Declaration of Independence's assertions of the individual's right to fight to sustain freedom and won the release of the defendants. See also Peter Keough, *Ship of Shame: Spielberg's "Amistad" Flogs Slavery*, (visited Feb. 23, 1998)

portrayed describing to two abolitionists, Lewis Tappan<sup>3</sup> and Ted Joadson,<sup>4</sup> his proposed strategy for defending fifty-three black captives charged with the mutiny and murder of most of the crew of the ship on which they were being transported for sale at a slave auction. Rather than propose a defense based upon an affirmation of the humanity of these Mende tribesmen, led by Joseph Cinque,<sup>5</sup> Baldwin proposes a novel legal theory that would cause the case to turn on the issue of whether the captives had been correctly identified as chattels: "The case is much simpler. . . Its's like . . . ah . . . anything . . . isn't it? Land, livestock, heirlooms . . . what have you. Determine who the rightful owner is and victory draws within spitting distance."<sup>6</sup>

Tappan's response portrays more than a hint of incredulity and revulsion: "Sir, this war must be waged on the battlefield of righteousness . . . . These are people. . . . Not livestock. Did Christ hire a lawyer to get him off on technicalities? He went to the cross, sir. Nobly. And you know why? To make a statement. As must we."<sup>7</sup>

"But Christ lost," Baldwin replies sardonically, "you, . . . want to win, don't you?"<sup>8</sup>

Success could come only if the trial also achieved the larger purpose of affirming the Christian religious principles of the abolitionist movement. Hence, we later hear Tappan commenting philosophically: "The truth is, they may be more valuable to our struggle in death than in life. . . . Martyrdom, Mr. Joadson. From the dawn of Christianity, we have seen no stronger power for change."<sup>9</sup>

The question is, of course, as much a double entendre as it is a rhetorical one. Every lawyer who is attuned to the possibilities of religion in their life recognizes this. It begs the question: Now, just what does it mean to mean to *win* in this circumstance? Certainly winning could

<[http://weeklywire.com/ww/12-15-97/boston\\_movies\\_4.html](http://weeklywire.com/ww/12-15-97/boston_movies_4.html)> (discussing the movie's interpretation of the story); Jeff Farance, *Spielberg Shines Light on Slavery*, (visited Feb. 23, 1998) <<http://www.n-jcenter.com/97/dec/12/mvanmista.htm>> (describing the movie's historical relevance).

3. Lewis Tappan was a wealthy silk-importer and staunch Puritan. As described by the author: "[He] had no tolerance for sin of any type. And he considered slavery to be a sin as damming as any other before the eyes of God. There was no compromise in him on these issues. Slavery had to be abolished for America truly to be a Christian society." Alex Pate, *Amistad 77* (1997). This novel, based on the screenplay by David Franzoni and Steven Zillian, was designated the official tie-in to the motion picture of the same name, directed by Steven Spielberg and produced by DreamWorks Pictures in association with HBO.

4. Pate describes Theodore Joadson as "one of the most distinguished-looking and sophisticated black men in New Haven. . . . [and] a good friend of Tappan's. . . ." *Id.* at 80.

5. For the purposes of this discussion, I will speak of "Cinque," but intend the reference also to mean the interest of all 53 of the Mende captives.

6. Pate, *supra* note 4, at 110.

7. *Id.* at 112-13.

8. *Id.* at 113.

9. *Id.* at 259.

mean hearing the court enter a judgement of not guilty. Under such a bottom line approach, the lawyer's role is to get the defendant off—keep him free—or in the subject case, to set him free. On the other hand, it could hardly have escaped Baldwin that one of the reasons—perhaps, the primary reason—that the abolitionists supported Cinque was their desire to use the trial to assert their abolitionist religious principles affirming the Christian humanity of black slaves. For them, the court announcement of a verdict of not guilty of murder would be insufficient. Success could come only if the trial also achieved the larger purpose of affirming the Christian religious principles of the abolitionist movement.

Accept for purposes of this discussion, therefore, Baldwin's assertion that the choice was between winning based upon his proposed legal strategy or losing based upon a highly principled, but ultimately futile, religious-affirming defense.<sup>10</sup> The essential choice between these approaches is that of determining whether the likelihood of securing a not guilty verdict is more greatly enhanced by giving Baldwin the opportunity to argue as a lawyer would argue to the legal decision makers or, rather, by allowing Cinque the opportunity to argue his case on ontological terms, as a moral affirmation—even if that risked his case not being understood. Put another way: In order to determine the role that religion ought to have played in Baldwin's life as a lawyer, we must first decide whether it would have been sufficient from Cinque's standpoint—professionally, ethically and morally—for Baldwin simply to have the right to address the decision maker (*i.e.*, voice), as opposed to having an opportunity to be understood, and it is hoped, persuasive (*i.e.*, communicate).

Thus, the distinction between *voice* and *communication* is more than semantical. It, too, depends on the existential nature of religion noted at the outset.<sup>11</sup> Because moral systems, are grounded in an individual's personal relationship with GOD,<sup>12</sup> they lack the common grounding that would be necessary to support discussions in the public forum. Unless the others in the forum share your morality, any attempt to impute the language, style or suppositions of that morality to them is condescending, at best, and dehumanizing at its worst. Thus, it is not that the religious voice ought not be heard in the public fo-

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10. The phrase "relevant religious principles" is used intentionally to avoid momentarily the issue of whose religious principle—Baldwin's or Cinque's—we are trying to affirm.

11. See *supra*, note 1 and accompanying text.

12. Note that a distinction must be drawn between what is moral and what is ethical. Moral systems are derived from first causes (e.g., a theistic view, a belief in logic, a belief in beauty, or the concept of the good) and, thus, are *a priori*. Ethical systems are human—usually collective—constructs that have quite utilitarian bases (e.g., professional callings). Thus, the morality of religious systems is, by definition, not subject to debate, since you cannot debate across moral systems. Because they purport to be utilitarian, on the other hand, ethical principles have strength only if they can be and are debatable.

rum; the Constitution guarantees that it will be. The problem—given the risk of no one understanding anyone—is that of deciding *which* religious voice ought to be heard in the public forum.

Fortunately, at least in the United States, the public forum is the people's forum. It excludes no particular voice, religious or otherwise. It does, however, have a default rule. Just as the religious voice must be anti-utilitarian, idiosyncratic and specific, the language that the default rule requires—the language spoken in the public forum—must be practicable, impersonal and generalized. It can sometimes be informed by religious concerns, but it must always be guided by public ones. In short, the default rule for the language of the public forum places a premium on the communication of ideas—not simply the experience of giving voice to them.

Ultimately, then, Baldwin's question to the defense team resonates beyond that circle of friends portrayed in trial strategy preparation. More broadly understood, it is the question that every lawyer must ask about the interaction of his religion and his profession: Do I want to speak, or to be understood? Given the lawyer's pledge of zealous advocacy within the bounds of law, however, the answer to such questions must now be clear. Whatever may be the religious need for voice, the lawyer's commitment must be to communicate. Accordingly, she must unstintingly try to do those things as a lawyer that maximize the chances of her client's success. Moreover, the lawyer's obligation permeates every aspect of the lawyer-client relationship.

Still, you will recall my earlier urging that, "because voice and communication speak to different needs . . . given the necessity to choose, the religious community should always concentrate upon the protection of voice, even at the risk of losing communication." If that stands as a statement of principle along sides what I now state is the obligation of a lawyer always to place communications ahead of voice when it comes to representing a client, you may properly ask whether these apparently inapposite obligations can be harmonized. The answer is, I am glad to say, that they cannot.

Nevertheless, what leaves me heartened is the understanding that in the act of contemplating these irreconcilables lies the answer to the central question with which we began. Thus, to appreciate and understand why the tension between voice and communication—between professing one's personal morality and communicating for a client—is necessary to the life of the religious lawyer is, simultaneously, to answer the question of what role, if any, religion ought to play in the life of the lawyer.

As Baldwin made clear, he understood the tension simply by asking a question that, absent its religious implications, would have been merely rhetorical—i.e., Do you want to win? Lawyering is an activity in the public forum that requires the kind of social intercourse that is

appropriate to the public forum.<sup>13</sup> It demands communication, not simply voice. For the lawyer, therefore, the personal question is whether he or she, as a religious person charged with representing persons in the public forum, can do so while remaining true to religious principles.

This is no easy task; nor should it be. As heirs, in many instances, to moral traditions that are thousands of years old, the lawyer who seeks to have religion play a role in his life must share an affinity with Mohammed's loneliness in the desert, Christ's burden of the cross, and Moses on Mount Sinai. It is partly, in fact, such willingness fully to confront one's belief that entitles a person to describe himself as one to whom religion matters. Another part, however, is equally important. Having opened oneself to a religious perspective, the lawyer in whose life religion makes a difference, must also be willing to risk asking the *terrible question*: whether the religious learning to which one is an heir is alone sufficient to meet the needs of the representation?

And a *terrible question* it is! In the answer lies a moral challenge for the religious lawyer that must cause discomfort like few others. If the answer is affirmative and application of the law alone will meet the lawyer's view of what the representation requires, the matter is easily handled. Provide the representation and move on. If, on the other hand, the answer is negative—application of the law alone will not meet the lawyer's view of what the representation requires—the lawyer confronts a moral dilemma. Like Baldwin, the lawyer must decide whether he should bring the larger religious concerns to bear even at the risk of losing the case. Sometimes, too, this may require the lawyer for whom religion matters to decide whether to interject religious views, even against the interest or wishes of his client.

For the lawyer of religious conviction to ask whether his or her legal learning is, alone, sufficient to meet the needs of the representation—including affirmation of the lawyer's moral views—is, thus, to bring the lawyer to a point of dread. Although the first response to recognition of the circumstance will, no doubt, be one of alarm, distaste and reluctance, these will give way to insight. Recognition will come precisely because for the religious lawyer the applicable analysis is obvious, the competing paradigms easily stated, and the answer imperative.

Consider, then, that in a democracy, the right to choose one's religion or nonreligion is among the first order of principles. To be a lawyer one must commit to the obligations of the public forum. The essence of the public forum is democratic and consensual. The idiom of the public forum is communication, the commonly agreed modality of interaction, because it allows the widest spectrum of individuals—

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13. See *supra* text accompanying note 1.

believers, agnostics and atheists—to engage in dialogue. Accordingly, no lawyer who acts in the public forum may do so other than on behalf of a client or through means other than those that have as their purpose most fully advancing the interest of his or her client—and only the interest of his or her client.

By way of contrast, we see that the imperative of the religious lawyer's paradigm must, in at least some limited instances, lead elsewhere. To be religious is, by definition, to commit to belief in and reverence for a spiritual ordering. The essence of the spiritual realm is moral and *a priori*. Its idiom is voice, the language of an individual—or individuals—in dialogue with GOD. Accordingly, no lawyer would be true to his religious self if he would act in the public forum other than in furtherance of the moral purposes to which GOD directs.

Although there cannot be a reconciling of the obligations that flow from these two paradigms, we can pay respectful homage to both. To start with, we can note that there will likely be only rare instances of conflict between the obligations of the lawyer who would have religion play a significant role in influencing his or her life and the obligations of any other lawyer. To the extent that our laws are not completely lacking moral content, religiously oriented lawyers and nonreligious lawyers alike, should be able to find large areas of common ground. As for the limited set of instances that the *terrible question* reveals to be problematic, there can be no choice for the religiously committed lawyer other than to choose withdrawal from the legal representation, if not from the legal profession. Although the professional sacrifice would be great, the moral loss in not doing so under the appropriate circumstance must be counted greater. Furthermore, if the cost of being a lawyer for whom religion makes a difference is not a significant cost, then the commitments we make in proclaiming ourselves to be religious lawyers surely cannot be seen as something of value. Moreover, the real concern of the religious lawyer must not be with the loss of the right to engage in a particular representation or even loss of the license to practice law. If commitment to have religion in one's life as a lawyer does not risk being costly, then to that extent, we are devaluing religion itself.

Finally, there is yet a second reason that lawyers who want religion in their lives must recognize and accept the high cost of practicing law that I suggest here. That explanation is the one with which I began. Whatever view one takes of GOD is right for you and not subject to rational contradiction by any other person.<sup>14</sup> I am prepared to accept this high price for being a lawyer in whose life religion plays a part, because any lower price—any circumstance where my ethics and my

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14. See *supra* note 1.

morality are not at risk—would be a circumstance when I was taking, both, my religious and my professional views less seriously.