HOW YALE LAW SCHOOL TRIVIALIZES RELIGIOUS DEVOTION

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I would like to thank Seton Hall Law School for inviting me to participate as a panelist in this event. And I would like to thank Professor Stephen Carter for his outstanding Holmes Devise lecture. I am honored to be part of the group of (otherwise) distinguished commentators given the opportunity to address different aspects of Professor Carter's themes of religion and public life.

I do not know Professor Carter well, but my contacts with him date back to 1982, my first year as a student at Yale Law School and his first as a professor. I am sure he will not remember our first meeting, but I asked Professor Carter if he would supervise me for an independent research paper on the religion clauses of the First Amendment. Professor Carter turned me down, explaining that his interests were more in the area of separation of powers and the structural provisions of the Constitution.

I am glad that Professor Carter's interests have branched out since that day about fourteen years ago! He has become one of the nation's leading academic spokesmen on the issue of religious liberty. I found myself agreeing with nearly every word Professor Carter said in his Holmes Devise lecture, which was a pleasant surprise: On other topics—including separation of powers and the structural provisions of the Constitution—I have sometimes found myself *disagreeing* with nearly every word Professor Carter has said.[1] (Perhaps Professor Carter will wish to reconsider his views on parents' rights to direct and control the education of their children, in light of the fact that I agree with his core thesis so completely).

Professor Carter is best known, in the law-and-religion area, for his excellent and provocative book, *The Culture of Disbelief: How American*

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[1] *See* Michael Stokes Paulsen, *Straightening Out the Confirmation Mess*, 105 YALE L.J. 549 (1995).

Law and Politics Trivialize Religious Devotion, in which he has spoken out powerfully, one might even say prophetically, about the shabby, condescending, and distinctly illiberal treatment our elite institutions accord religion in the public square. *The Culture of Disbelief* bears an important message and Professor Carter is an important messenger. In many ways, Professor Carter is the perfect missionary to the heathen up at Yale. Here is a liberal intellectual with impeccable academic credentials, a string of important publications, and a known commitment to civil rights, who is also a sincere, committed Christian. Professor Carter has forced an irreligious but influential corner of society—secular, liberal legal academia—to reckon with ideas and values that it would be prepared all too readily to dismiss if they came from what academics label the "religious right" (that is, persons with deep religious convictions whose politics happen to be, or are as a consequence, "conservative"). Because Professor Carter is who he is, however, secular liberals are increasingly being forced to confront their own trivialization of—and, consequently, *intolerance toward*—religion and those who take religious devotion seriously. And for that, many of us can be thankful for Professor Carter.

But a prophet is not without honor, except in his own home. My intention today is to illuminate, and augment, an important theme in Professor Carter's work by reference to the extreme negative example of Professor Carter's workplace. For sadly, Yale Law School—my alma mater and Professor Carter's—discriminates on the basis of religion. The title of my comment derives from the subtitle of Professor Carter's book: "How American Law and Politics Trivialize Religious Devotion." I want to focus on a single episode, but one that speaks volumes about the Culture of *Diss-ing* Belief at Yale Law School, because it is so remarkably insensitive and intolerant toward those who take their religious faith seriously, and because this insensitivity and intolerance was a knowing and carefully considered political act, taken after more than a year of patient correspondence: Yale Law School has adopted a policy of discriminating against religious organizations that wish to recruit at Yale.

I.

For at least the past two years, Yale Law School has refused to allow the Center for Law and Religious Freedom of the Christian Legal Society (CLS) to participate in the on-campus interview process for recruiting its students for summer law clerkships. The CLS is a national association of Christian lawyers, law students, and judges committed to integrating their Christian faith with the professional practice of law, service to others, and defense of religious liberty. The Center for Law and Religious Liberty is the arm of CLS devoted to religious liberty

work. CLS understands itself as a Christian ministry organization. Its members—and its employees—subscribe to a basic statement of Christian faith.[2]

It is this last requirement—adherence to CLS's Statement of Faith—that bothers the folks at Yale Law. Yale has a policy of denying access to campus recruiting facilities to employers who do not subscribe to Yale's nondiscrimination policy, which includes nondiscrimination on the basis of religion. According to Dean Tony Kronman, speaking on behalf of the faculty and administration, for a religious organization to expect its employees to subscribe to a statement of faith constitutes "discrimination" on the basis of religion. Accordingly, CLS's statement of faith—its religious identity—disqualifies it from participating in the usual on-campus recruiting program at Yale Law School. As Yale Associate Dean Barbara Safriet put it, "[w]e cannot offer our placement services to employers who, *for whatever reason*, do not abide by our non-discrimination policy in its entirety."[3]

Dean Kronman later amplified that explanation:

> After a thorough review, the Law School's Placement Policy Committee has recommended, by a divided vote, that we make no change in our current policy of requiring all employers who wish to participate in our on-campus interviewing process to state that they do not discriminate on the basis, among other things, of religious belief. The Committee considered whether we should exempt religious employers from this requirement and concluded that we should not.
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> I accept the Committee's recommendation for the following reason. The Yale Law School provides its students with many benefits and opportunities—the opportunity to attend classes and lectures, to participate in various student organizations, to work as teaching and research assistants, and the like. Of course, not every student chooses to participate in every activity, and participation in some is competitively limited. But in no case are students excluded on account of their race, sex, sexual orientation or religious belief from the benefits and opportunities the School provides. *Exclusion on any of these grounds would be antithetical to the community the Law School aspires to create.* Employers who participate in our on-campus interviewing process also offer our students real benefits and opportunities (the benefit of being considered for a job and the opportunity to compete for it). This process is organized, administered and financially subsidized by the Law School, and hence falls within the circle of our

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[2] The reader should note that I served as staff counsel for the Center from 1986-1989, and was a summer law clerk there in 1985, immediately after graduating from law school and while studying for the bar.

[3] Letter from Barbara Safriet to Greg Baylor (Jan. 20, 1995) (on file with author).

> own institutional life, in contrast to interviews that employers arrange with our students on their own. *The same principle of nondiscrimination the School applies to the provision of other benefits and opportunities must therefore also be applied to the provision of those afforded our students in the on-campus interviewing process.* Our present placement policy achieves this goal. This policy is founded upon—indeed, it is required by—the School's commitment to treat its students in a consistent fashion across the full range of benefits and opportunities the School, and anyone acting with the authority and support of the School, affords them. *The ideal of community that animates the life of the School demands this.*[4]

II.

My simple thesis is that Yale's policy—and its administrators' interpretation and defense of it—is intensely disrespectful of serious religious devotion and commitment. By woodenly treating a religious organization's desire to maintain a distinctive religious voice and membership as "discrimination," the Yale Law School community has shown itself to be either (i) incapable of distinguishing religious exercise, advocacy, and community from real discrimination on the basis of religion, or (ii) determinedly hostile to religious advocacy and ministry groups, on the ground that they are a dangerous threat to (Yale's vision of) The Correct Society.

The former view trivializes religious devotion within religious communities, by treating it as nothing other than a species of invidious social or economic discrimination. No one could possibly think (the reasoning might go) that adherence to Christianity could really be relevant to employment as a lawyer, even in a Christian ministry organization. CLS's statement of faith is indistinguishable from social discrimination against Jews by white shoe New York law firms in the bad old days. But to miss the distinction between *Christian* Legal Society wanting to hire committed *Christians* to carry out its *Christian* mission, and a secular law firm engaged in social discrimination on the basis of religion, is to miss something vitally important: It is to miss the possibility that certain communities take religious belief seriously as part of what it means for them to *be* a community (just as Yale Law School asserts that it wishes to form a "community" of a certain type, an irony I will explore presently). It is to miss the possibility that, for many, religion is *not* a social affilia-

[4] Letter from Dean Tony Kronman to Gregory S. Baylor, Assistant Director, Center for Law & Religious Freedom (July 15, 1996) (emphases added) (on file with author).

tion or a club—not a "hobby" (to borrow Professor Carter's term)[5]—but is instead the most serious commitment there is. To miss this (especially while one is espousing the importance of one's own secular-political educational "community") is, I submit, to engage in religious bigotry by ignorance and stereotyping. To steal Fred Gedicks's memorable phrase, it seems that the Yale Law School community cannot tell the difference between a yarmulke and a cowboy hat.

Disturbing as that is, I *hope* that that is the explanation for Yale's conduct. For it is better than the alternative, which is that Yale Law *can* tell the difference between CLS and a law firm, but that Yale Law regards *both* as insidious. This view does not so much trivialize religious devotion as attempt to stigmatize it as something intrinsically immoral, intolerant, or narrow-minded. That, I submit, is religious bigotry pure and simple.

I hope that is not the case with my old school, and so I prefer to think that the policy is simply political correctness run (further) amok, and having lost sight of first principles in pursuit of second-order policies. It is easy to lose sight of such principles if one has a blind spot with respect to religion. Ignorance breeds its own hostility, and there is no more zealous bigot than the one who is absolutely convinced of the imperative of enforcing against others his own views of morality, tolerance, or liberality.

III.

Yale makes such a good (bad) example for a number of reasons. First, just because it is Yale. There is something mildly absurd, and thus quaint, about the vigor with which Yale Law School feels the need to protect its vulnerable and sensitive students from the horrible discrimination of allowing CLS to be given the opportunity to interview on campus with those students who wish to speak with them.

More substantively, Yale makes an interesting example because it is a *private* institution that wishes to make its own particular statement of ideological principle, through the vehicle of its placement office policies. Ironically, because Yale is private, I think that a powerful case can be made that Yale has the right—the *constitutional* right—to pursue its policy of religious discrimination. And the reasons why Yale has such a right are exactly the same reasons Dean Kronman found unsatisfactory when raised by CLS.

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[5] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 23 (1993) (critiquing the view that treats "God as a hobby").

Let me explain this by considering first the situation if Yale were a *public* law school. If Yale were a public institution, what Yale is doing would be, I think, a clear violation of the First Amendment. This is so for two closely related reasons. First, because religious organizations have the right to be religious. An important, well-recognized part of this right of religious autonomy is the ability of religious institutions to define their own membership according to their own criteria.[6] For the "University of Connecticut at Yale" to condition access to a state benefit on a religious organization's abandonment of religious membership requirements would violate the Free Exercise Clause.[7]

Second, Yale's policy would be unconstitutional (were it a public law school) because it violates the First Amendment freedom of association, derived from principles of free speech. The right of a religious organization to be religious is just a special case of the right of any ideological association to be what it wants to be, and, toward that end, to control its own membership decisions.[8] Surely Yale would respect that right with respect to advocacy organizations other than CLS. A contrary proposition would seem foolish, even to Yale Law School: Would Yale require, as a condition of access to the law school placement office, that the Sierra Club hire anti-environmentalists? That NARAL hire prolifers? No. At some level, Yale recognizes that ideological and advocacy groups get to "discriminate" on the basis of ideology—that is, such groups may require its employees to be "with the program."

CLS *is no different*. CLS wants people who are committed to its principles. For Yale to exclude CLS on the basis of *its* particular ideological commitment is content-based discrimination. Yale singles out a particular form of ideological association—religious association—for direct discriminatory treatment. Yale's interpretation of its nondiscrimination policy basically says "*Religion* is not a legitimate basis for ideological association. We don't like *religious* ideological association." For the University of Connecticut-Yale to have such a policy thus violates the First Amendment's free speech clause, as well as its free exercise clause.

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[6] Even Congress has figured this out. Section 702 of Title VII of the Civil Rights Act of 1964 exempts religious employers from Title VII's prohibition of religious discrimination in employment. *See* 42 U.S.C. § 2000e-1; *see generally* Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

[7] I develop this argument (and the one in the following paragraph) at some length, including discussion of relevant case authority, in Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653 (1996). The arguments for religious autonomy are set forth at *id.* at 699.

[8] The leading case on this point is *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981). There are numerous others that support it. *See* Paulsen, *supra* note 6, at 677-97.

Now, because Yale in fact is *not* a public law school, its actions do *not* violate the First Amendment. Religious discrimination by private institutions is not *unconstitutional*, because there is no state action. Of course, there is a strong argument that Yale's actions *do* violate federal civil rights laws forbidding discrimination by private employment agencies.[9] But because Yale is a private law school, I submit that Yale has a First Amendment *right* to discriminate on the basis of religion if that is the way Yale Law School wishes to define *its* community.[10]

Dean Kronman is right (more or less) on this point. Seton Hall University can be as religious as it wants to be (or as quasi-religious as it wants to quasi-be). Yale can be as secularist, or as "PC," or even as anti-religious and bigoted as it wants to be. This is basically the ground on which Dean Kronman defended Yale's actions: Allowing a religious employer that has a statement of faith for its employees to interview on campus is "antithetical to the community the Law School aspires to create."

Though I doubt they would appreciate the analogy, Yale is in the same position as the organizers of the Saint Patrick's Day parade in the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group.*[11] *Hurley* is the Supreme Court's most recent—and unanimous—reaffirmation of the right of private ideological association. The parade organizers did not want a gay rights group marching in their parade, because that was not what they wanted their parade to be about, even in part. The Supreme Court held, in a nutshell, that parade organizers get to control the content of their own parade and that the state cannot make them include marchers they do not want to include.

In a sense, the Yale placement office is Yale's parade. If Yale doesn't want CLS to march in its parade, because it does not like CLS's message, Yale has the right to keep them out. (And it has that right notwithstanding federal antidiscrimination laws.) *Hurley* was emphatic on this point, and *Hurley* is, I think, emphatically correct as a matter of constitutional law.

Having the legal right to do something doesn't make it morally right, of course. Yale Law School is, morally, in the same position as

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[9] *See* 42 U.S.C. §§ 2000(c), (e). The argument why this is so would take me far afield from my main point.

[10] I believe that a public law school does not have any similar quasi-speech right of defining itself by excluding certain speakers or viewpoints. *See* Rutan v. Republican Party, 497 U.S. 62 (1990) (holding that hiring, firing, and promotion decisions of governmental institutions may not be based on political affiliation or viewpoint of an individual's speech). It certainly may not define itself by excluding religious speakers and viewpoints. *See* Widmar v. Vincent, 454 U.S. 263 (1981).

[11] 115 S. Ct. 2338 (1995).

the old-line exclusive New York law firm that discriminates against Jews; or a country club that excludes Jews (or Catholics). Think about it: *A private secular entity (Yale Law, White Shoe Firm) is discriminating on the basis of the religious background, belief, or association of those seeking to do business with it in the commercial marketplace.* The only thing that keeps Yale Law School from being in violation of federal civil rights law is the right of private associations to define their own communities—a right that Yale Law School is unwilling to accord religious employers who wish to interview at the school. While I am willing to swallow hard and grant Yale Law School the right to freedom of expressive association as an "ideological" organization—though how sad that the nation's top law school does not see itself as an "open forum" rather than an ideologically-defined community!—the reality is that Yale, in exercising its legal rights, is behaving as badly as the discriminatory Wall Street firms of the past. Yale just puts a late-1990s, "politically correct" twist on its discriminatory policy. It does not discriminate against Jews. Instead, it discriminates against Christians—or at least those who take their Christian commitment seriously—and Yale thinks that that is not only permissible, but the right thing to do.

IV.

That brings me back to Professor Carter and *The Culture of Disbelief*. The final way in which Yale is such an ironic bad example is that the author of *The Culture of Disbelief* works in a culture of disbelief that trivializes (if it does not affirmatively despise) genuine religious devotion. As Professor Carter has written, concerning the issues presented by the *Hurley* case,

> it is absurd to say that because a public license is obtained, traditional religious freedom is surrendered. . . . [I]f . . . religious significance entails discrimination—or other policies that the state could never accept for its own activities, *that is simply a cost of a freedom that the society should scrupulously protect.*"[12]

I would go slightly further. The right of religious organizations to be religious—in their beliefs, in their policies, in their membership practices—is not merely a "cost" of freedom to be endured out of necessity. It is, I submit, an *attribute* of freedom to be enthusiastically embraced. But it is an attribute of freedom rejected by the Yale Law School. If one is looking for evidence of the existence of a Culture of Disbelief that

[12] CARTER, *supra* note 5, at 149 (emphasis added).

trivializes and attempts to stigmatize serious religious commitment, one need look no further than the halls of the Yale Law School.[13]

[13] During the panel discussion at the Holmes Devise lecture program, Professor Carter revealed, to my surprise, that he had been a member of the Yale Law School Placement Policy Committee that had recommended that the school not exempt religious employers from any aspect of the nondiscrimination policy. Professor Carter stated that the Committee had agreed among themselves not to make individual statements concerning this matter. Consequently, Professor Carter said, "I am unable to say anything in defense of Yale's policy." He added, however, that "even were I not a member of the committee, I would be unable to say anything in defense of Yale's policy."