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A VIEW OF THE LEGAL PROFESSION FROM A MID-TWELFTH-CENTURY MONASTERY

Amelia J. Uelmen*

INTRODUCTION

Critics of trends in the legal profession often hark back to an elusive “golden age” in which ideals of service and respect for the truth tempered lawyers’ seemingly prevalent instincts toward ambition and manipulative greed. As the American Bar Association Commission on Professionalism reflected in 1986, “Perhaps the golden age of professionalism has always been a few years before the time that the living can remember. Legend tends to seem clearer than reality.”¹

This essay looks back quite a few years—certainly to before the time the living can remember—to the mid-twelfth century, an era that some have marked as the dawn of the modern legal profession in Western European culture. An initial glance indicates that it was no “golden age” for the profession. Even in the twelfth century, lawyers were the object of popular hostility and scathing criticism.² Probing

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1. American Bar Association Commission on Professionalism, “. . . In the Spirit of Public Service”: A Blueprint for the Rekindling of Lawyer Professionalism 55 (1986).

2. James A. Brundage, *The Ethics of the Legal Profession: Medieval Canonists and Their Clients*, 33 *Jurist* 237, 237 (1973) [hereinafter Brundage, *Ethics*] (“Every society that has an identifiable group of professional lawyers has complained about their behavior, frequently in terms of righteous indignation. . . . Anyone who reads at all widely in medieval literature will repeatedly run across passages in which the manners, morals, and even the very existence of lawyers will be deplored. This theme is strikingly developed especially in the literature of the twelfth century.”); see 1 John W. Baldwin, *Masters, Princes and Merchants: The Social Views of Peter the Chanter and His Circle* 193 (1970) (“In medieval times lawyers were often the object of popular hostility, a reaction which they have endured since the origins of their profession. This prevailing distrust permeates the writings of the theologians.”); see also Jonathan Rose, *Medieval Attitudes Toward the Legal Profession: The Past as Prologue*, 28 *Stetson L. Rev.* 345 (1998). For a humorous collection of the “cries and

deeper, the patterns of critique reveal a certain timelessness, and a sense that the tensions imbedded in both the initial and enduring framework of the legal profession reflect not so much the weaknesses of a particular generation, but rather essential struggles in the heart of human experience.

For some it may seem counterintuitive to travel so far back in time for insight into "professionalism." How can an era shrouded in darkness, so permeated by backward and barbaric practices, shed any light on the legal profession today?³ Even sensitive legal historians who generally avoid stereotypical images of the medieval "superstitious bumpkin" have nonetheless been unable to resist taking their jabs at the twelfth century.⁴

To compound the challenge of looking so far back, this essay will focus not on secular texts, but on mid-twelfth-century religious and theological sources, thus posing an alternative to characterizations of the "disengagement of the two spheres of the sacred and the profane" as "a release of energy and creativity analogous to a process of nuclear fission."⁵ Further, at the center of this analysis is a text from a

protests of generations of victims and critics" of the legal profession, see Andrew Roth & Jonathan Roth, *Devil's Advocates: The Unnatural History of Lawyers* 168 (1989).

3. It would be enough to consider that, in Western Christian Europe, the ordeal as a method of proof was not officially repudiated until 1215. See H. J. Schroeder, O.P., *Disciplinary Decrees of the General Councils* 258 (1937) [hereinafter *Disciplinary Decrees*] (English translation of Canon 18 of the Fourth Lateran Council (1215)) ("Neither shall anyone [subdeacon, deacon, or priest] in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing; the earlier prohibitions in regard to dueling remain in force."). For a thoughtful and thorough discussion of the repudiation of the ordeal, see Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 *Syracuse L. Rev.* 109 (2000); see also discussion and notes *infra* at Part III.C.2.a.

4. See, e.g., Richard M. Fraher, *Conviction According to Conscience: The Medieval Jurist's Debate Concerning Judicial Discretion and the Law of Proof*, 7 *Law & Hist. Rev.* 23, 27, 57 (1989). Fraher noted that the spirited debate about the level of judicial discretion "challenges the assumption that the people of medieval Europe were so steeped in traditional, magico-religious views of the world that they could not accept human judgment in criminal cases" but at the same time placed the marker of "rationality" in the thirteenth century.

If anything, scholastically trained jurists possessed increasing confidence in human judgment during the 1200's, when Aristotle's theories of active human intellection, and of the natural origins of human society and its government permeated by the study of arts, theology, and law. [These jurists] lived in the intellectual milieu of Thomas Aquinas, not the mystical one of Bernard of Clairvaux. In urban culture, it would be anachronistic to cast the thirteenth-century man on the street as a superstitious bumpkin who trusted more in miracles and portents of divine or magical powers than in the works of man.

Id.; see also Etienne Gilson, *Reason and Revelation in the Middle Ages* 3-4 (1938) (describing how it is not unusual to find history textbook characterizations of the "Dark Ages" in which "the normal use of natural reason was obscured by blind faith in the absolute truth of Christian Revelation").

5. Peter Brown, *Society and the Supernatural: A Medieval Change, in Society and*

twelfth-century Cistercian⁶ monk, Bernard of Clairvaux, hardly the most cited authority on the legal profession.⁷

Thus this essay begins with an invitation to suspend judgment by giving this seemingly obscure time and these sources so rarely discussed in current legal circles a chance to speak. One may be surprised by how they shed new light on the timeless and timely questions and dilemmas of today's legal profession.

This essay first gives a brief contextual overview of the cultural terrain for the development of the legal profession at mid-twelfth century. Then, working with a text by Bernard of Clairvaux, it will explore how Bernard addressed the themes of lawyers' responsibilities to the public and the limits of advocacy. The themes are too rich and complex to do even minimal justice in a short essay. This analysis does not purport to be comprehensive, but rather hopes to signal tantalizing paths for further research and exploration.

I. A FEW NOTES ON THE MID-TWELFTH-CENTURY CULTURAL TERRAIN

Scholarship on the political and religious terrain for the initial development of the legal profession in Western European culture, particularly on the relationship between law and religion, and the tensions between secular and ecclesiastical powers, already fills hundreds of library shelves.⁸ This section only briefly touches on a few of the principal cultural themes which will help to put into context Bernard of Clairvaux's mid-twelfth-century critique of the legal profession.

the Holy in Late Antiquity 302 (1982); see also Anna Sapir Abulafia, *Twelfth-Century Humanism and the Jews*, in *Christians and Jews in Dispute: Disputational Literature and The Rise of Anti-Judaism in the West* (c. 1000-1150) 31 (1998) (discussing R.W. Southern's definition of humanism as denoting "the study of man and his nature, as opposed to what seems to lie beyond him, that is, the supernatural," and how the widespread notion that "humanism has to be secular" has prevented many from recognizing the humanism of scholastic thought).

6. Readers may be more familiar with the prominent nineteenth-century revival of the Cistercians, the "Trappists," named for the La Trappe monastery in Switzerland. Thomas Merton, the monk well known for his 1948 autobiography, *The Seven Storey Mountain*, lived in the Trappist monastery in Gethsemani, Kentucky. See generally Louis J. Lekai, *The Cistercians: Ideals and Reality* 179-92, 213 (1977).

7. See, e.g., Brown, *supra* note 5, at 319 (distancing any connection that monks might have to the "real world," stating that "[t]he ideal of this society for centuries is the monk who is not technically human: he lives the life of angels"). For a most noteworthy exception, see James A. Brundage, *St. Bernard and the Jurists*, in *The Second Crusade and the Cistercians* 25-33 (Michael Gervers ed., 1992) (discussing Bernard's use of concepts drawn from canon law and the influence of Bernard's ideas on the development of law itself).

8. For a helpful and accessible overview, see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983) [hereinafter *Law and Revolution*].

A. *The Political Terrain: Papal Revolution*

In Western Europe toward the end of the eleventh and into the twelfth centuries, a fundamental change took place “in the very nature of law both as a political institution and as an intellectual concept.”⁹ From what legal historian Harold Berman describes as the “Papal Revolution,” “[p]olitically there emerged for the first time strong central authorities, both ecclesiastical and secular, whose control reached down, through delegated officials, from the center to the localities.”¹⁰ While defining and distinguishing the realms of ecclesiastical and secular authority—*sacerdotum* and *regnum*—is an ancient theme in Western Christian European culture,¹¹ in the twelfth century, it could certainly be considered one of the burning issues of the day.¹² Because the political and intellectual distinctions were just taking shape, practical analysis of the tensions between the two realms is complex. For example, neat lines between civil and ecclesiastical jurisdiction had not yet emerged;¹³ in fact, it may be hard to define even when courts were functioning as courts.¹⁴

9. *Id.* at 86.

10. *Id.*

11. See generally G.R. Evans, Bernard of Clairvaux 152-58 (2002) [hereinafter Evans, Bernard of Clairvaux] (summarizing the motif of “two swords,” representing royal power and pontifical authority, in ancient and medieval texts); G.R. Evans, *The Mind of St. Bernard of Clairvaux* 198 (1983) [hereinafter Evans, *The Mind*] (describing the image of the two swords as based on the following account in Luke 22:36-38: just prior to his arrest Jesus told his disciples to prepare for what was to come—whoever did not possess a sword would be wise to sell his cloak and buy one. They found two swords and brought them to him, and he said, “It is enough.”).

12. See, e.g., Evans, Bernard of Clairvaux, *supra* note 11, at 144 (naming as the “great issue of the day” the relation of Church to state jurisdiction); *id.* at 154 (“Bernard was born into a world extremely conscious of a fundamental conflict of authority between spiritual and temporal, Church and state.”); R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. Chi. L. Rev. 297, 311-14 (1999) (describing the eleventh- and twelfth-century Church’s focus on establishing freedom of the clergy from control by the laity). For background on the 1077-1122 “Investiture Contest,” the Church’s struggle to free itself from secular rulers’ attempts to interfere with and control the appointment of bishops, see generally Law and Revolution, *supra* note 8, at 85-119 and Evans, Bernard of Clairvaux, *supra* note 11, at 155.

13. For example, questions of jurisdiction were particularly complex since Bishops held lands and rights equivalent in extent and status to those of a secular baron, and thus could preside over secular courts. See Evans, Bernard of Clairvaux, *supra* note 11, at 144, 155. Further, both ecclesiastical and secular courts may have had a claim for jurisdiction based either on the subject matter, or in cases where the clergy were accused, on claims of personal privilege. See, e.g., R.H. Helmholz, *Civil Jurisdiction and the Clergy*, in *The Ius Commune in England* 193-94 (2001) (describing how the distinction between ecclesiastical and secular jurisdiction rested not only on the characterization of claims as either spiritual or temporal, but also on the *privilegium fori*, the medieval presumption that men were entitled to be judged by their own law). See generally Evans, Bernard of Clairvaux, *supra* note 11, at 144-45; G.R. Evans, *Law and Theology in the Middle Ages* 1-4 (2002) [hereinafter Evans, *Law and Theology*].

14. Evans, *Law and Theology*, *supra* note 13, at 42 (stating that church courts, separate institutions staffed by professionals to resolve disputes or prosecute crimes, did not develop until the twelfth or thirteenth century).

To put it mildly, Bernard of Clairvaux lived in a world of political, social and religious flux. In fact, he himself had a hand in defining and shaping some of the principal doctrines which emerged from the Papal Revolution.¹⁵

B. *The Legal Terrain: A Nascent Professional Class of Jurists*

Partially in connection with the development of strong central secular and ecclesiastical authorities, a class of professional lawyers and judges was emerging in both the secular and ecclesiastical realms.¹⁶ The marker of the dawn of the Western European legal profession is of course debatable, and depends to a large extent on one's definition of "profession."¹⁷ Some scholars mark the beginning of the legal profession towards the end of the twelfth century.¹⁸

15. For example, the doctrine of papal plenitude of power, that the Pope held ultimate authority to hear appeals "from the whole world" was just emerging during this time, as elaborated in one of the principal texts this essay explores, Bernard of Clairvaux's *On Consideration*. Evans, *Law and Theology*, *supra* note 13, at 44; *see also* 13 The Works of Bernard of Clairvaux, *Five Books on Consideration*, Advice to a Pope, Book 3:6 (John D. Anderson & Elizabeth T. Keenan trans., Cistercian Pub. 1976) [hereinafter *On Consideration*] ("Appeal is made to you from the whole world: this, indeed, is testimony of your unique primacy.").

16. Law and Revolution, *supra* note 8, at 86.

17. For a helpful starting point, see Paul Brand, *The Origins of the English Legal Profession* vii-viii (1992) ("[A] 'professional lawyer' is someone recognized by others as having a special expertise in legal matters and who is willing to put that expertise at the disposal of others, who is paid for doing this and who spends a major part of his time in this professional activity. A 'legal profession' exists when professional lawyers start being singled out for special regulation in their professional activity."). Compare James A. Brundage, *The Rise of the Professional Jurist in the Thirteenth Century*, 20 Syracuse J. Int'l L. & Com. 185, 185 (1994) [hereinafter Brundage, *Professional Jurist*] ("I take the term profession or professional to mean a highly skilled, terminal occupation that can only be entered through some kind of formal admission. These practitioners undertake to abide by a set of ethical standards, and enjoy in return a publicly sanctioned monopoly on the practice of their trade and a measure of authority resulting from their peculiar skills, coupled with high social status and esteem."); with James A. Brundage, *The Rise of the Professional Canonists and the Development of the Ius Commune*, 81 *Kanonistische Abteilung* 26 (1995) (describing the stages of professionalization of canonists).

18. For example, Professor Brand argues that England before the middle of the twelfth century was a country without professional lawyers. Brand, *supra* note 17, at 3 (noting that the emergence of professional lawyers was "a response to the changed legal environment created by a number of separate but linked developments in the English legal system which took place in and after the reign [1154-1189] of Henry II"); *see also* Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 Syracuse L. Rev. 1, 4 (1998) (beginning with legislation in the mid-thirteenth century); Helmholz, *supra*, note 12, at 346 (discussing the 1215 Magna Carta's vague requirement that judges must "[k]now the law," with no educational requirements or objective standards for ascertaining the requisite knowledge). Using a similar definition to Brand's, James Brundage has concluded that in Western Europe lawyers became professionals through a gradual process that began in the late twelfth century. Brundage, *Professional Jurists*, *supra* note 17, at 185; *see also* Evans, Bernard of Clairvaux, *supra* note 11, at 141 (noting that in the 1140s, "[a]head lay the era of the professional law schools at Bologna and of the kind of papal headhunting in

Others have traced an earlier and more gradual development, spanning across the twelfth century.¹⁹

Might the mid-twelfth century be too soon for a critique of the professional lawyer as we understand the term today? Even if the lawyers who were the subject of Bernard's critique may be defined as "proto-professionals" rather than professionals,²⁰ his critique is nonetheless helpful. In the initial seed of the Western European legal profession, Bernard was able to identify and shed light on the essential tensions that would later track the profession's development throughout the centuries.

C. *The Educational Terrain: The First Law School*

It is illuminating to place a mid-twelfth-century critique of the legal profession against the backdrop of the initial development of the Western European universities, and in particular, of the first law school at the University of Bologna. By the mid-twelfth century, the University of Bologna was drawing young men from all parts of Italy and Western Europe, attracted by its exclusive concentration on the study of law.²¹ Many students were among the wealthiest, as law was widely considered the most lucrative occupation and the broadest pathway to public advancement.²²

those schools in which Innocent III was to engage in the period up to the Fourth Lateran Council of 1215").

19. See, e.g., Manlio Bellomo, *The Common Legal Past of Europe 1000-1800*, at 55-56 (1995) (concluding that Italy in the eleventh and early twelfth centuries shows proof of a return to the study and use of Roman law; and noting that in some areas of Italy the technical quality of notarial acts showed a clear improvement; already by the beginning of the twelfth century, "[m]ore and more concentrated thought was devoted to legal norms and the behavior they regulated. At the same time, juridical theory helped to give a new quality and a new dignity to the work of practitioners, notaries first among them"); Law and Revolution, *supra* note 8, at 116 (stating that a class of professional lawyers and judges emerged in the wake of the Papal Revolution); Susan Reynolds, *Fiefs and Vassals* 258 (1994) (conceding that the twelfth century is probably too early to talk about a legal profession in France, but also noting that government at almost every level was beginning to use at least semi-professionals in making records and arguing from them); see also Brand, *supra* note 17, at 50-54 (acknowledging the presence of mid-twelfth-century "proto-professionals" who may have assisted and represented litigants, and even charged for their services, but who did not quite fit the definition of "professional" because of the sporadic nature of their legal work); Evans, *Law and Theology*, *supra* note 13, at 50 (noting that by 1158, Bologna had enacted a statute requiring the study of law for five years before one may be a judge or jurisconsultant); John H. Mundy, *Europe in the High Middle Ages 1150-1300*, at 283 (3d ed. 2000) (noting the increasing professionalization of legal personnel in the twelfth century). See generally Reynolds, *supra* at 231 (discussing twelfth-century legal developments in Italy); Susan Reynolds, *Medieval Law, in The Medieval World 485-502* (Peter Linehan & Janet L. Nelson eds., 2001) (including an excellent bibliography); Rose, *supra* note 18, at 8-12 (discussing the development and characteristics of proto-professional attorneys).

20. See Brand, *supra* note 17, at 50-54. See generally Rose, *supra* note 18, at 8-12.

21. See generally Bellomo, *supra* note 19, at 112-14.

22. Baldwin, *supra* note 2, at 84; Bellomo, *supra* note 19, at 114; Hastings

It is not shocking that this development provoked critique from theologians and leading religious figures, perhaps in part motivated by fear that the study of law would become theology's "brain drain." As John Baldwin describes, "[I]n the rivalry of self-esteem and the competition for good students the theologians naturally tended to depreciate their medical and legal colleagues by calling theirs the 'lucrative sciences' (*lucrative scientiae*)."²³ In Paris, students were warned not to abandon theology for the lucrative science as lawyers and doctors, and those who did were considered to have "gone a whoring from thy God," and were compared to the money changers Christ drove from the Temple.²⁴

For their own part, the nascent law schools did not exactly welcome an interdisciplinary approach with open arms. In the University of Bologna, as David Knowles describes, there was "absolutely no connection" between the law university and the other faculties; theology was "practically confined to the schools of the religious orders."²⁵

This was perhaps due in part to the nature of the law texts and curriculum. The celebrated master of law, Irnerius, introduced the systematic study of the whole *Corpus Iuris Civilis* as the regular curriculum for legal education.²⁶ As Hastings Rashdall depicts:

If the whole *Corpus Iuris* was to be taught, it required the undivided attention of its students; henceforth, the student of law had no leisure for other studies and the student of arts no longer ventured to meddle with so vast and so technical a subject until mere school-education was over. . . . [F]rom the time of Irnerius law ceases to be a branch of rhetoric and therefore an element in a liberal education; it becomes a purely professional study for a special class of professional students.²⁷

Rashdall, *The Universities of Europe in the Middle Ages 132-33* (F.M. Powicke & A.B. Emden eds., 1964) (describing the political and commercial value of legal knowledge).

23. Baldwin, *supra* note 2, at 85; *see also* Bellomo, *supra* note 19, at 114; Brundage, *Ethics*, *supra* note 2, at 238 ("The theologians, too, had their own ax to grind with the lawyers, particularly the canonists, whom they perceived as rivals and whom they accused of monopolizing ecclesiastical preferments to the detriments of both the Church at large and of theological scholars in particular.").

24. Baldwin, *supra* note 2, at 85-86; *see also* Bellomo, *supra* note 19, at 114.

25. David Knowles, *The Evolution of Medieval Thought 147-48* (2d ed. 1962).

26. Rashdall, *supra* note 22, at 123; *see also* Knowles, *supra* note 25, at 142.

27. Rashdall, *supra* note 22, at 124; *see also* Bellomo, *supra* note 19, at 114 (describing the efforts of those who learned to use "words six-feet long" and committed to memory with great effort the entire *Corpus Iuris*); Knowles, *supra* note 25, at 143 (asserting that Irnerius made the study of law "more scientific, technical and professional than before, and established it firmly and finally as a subject for higher education, not merely as a part or appendage of the *trivium*"); Rashdall, *supra* note 22, at 132-33 (surmising that such marked the birth of a new class of older, and more independent students, often of noble birth and good position: "Legal knowledge possessed then, as it still possesses, a political and commercial value to which no

Thus the structure of the curriculum set law students up for indifference to other disciplines because the sheer volume of material left them with no time to pursue the rigors of theology.²⁸ Although one should be careful not to read too much into the formal distinctions in curriculum, it is useful to place Bernard's critique against a backdrop of some level of indifference, if not rivalry and hostility, between the disciplines of law and theology.²⁹

D. *The Religious Terrain: Clergy Prohibited from Studying Civil Law*

Finally, it is also instructive to note that the Papal Revolution consisted not only in defining the Church's relationship with secular authority, but also in asserting vigorous internal disciplinary measures which aimed to reduce the dangers and excesses of clergy being too intertwined with secular life.³⁰ For example, a portion of Canon Nine

purely speculative knowledge can pretend.”).

28. See Alexander Murray, *Reason and Society in the Middle Ages* 222-24 (1978) (stating that in the mid-twelfth century, even the development of canon law has been considered to widen rather than bridge the gap); Rashdall, *supra* note 22, at 135-36 (describing the canon law scholars as in closer relation with civil lawyers; and that while the chair of theology no doubt remained, in the later twelfth century “the study of theology proper ceased to have any special importance at Bologna”); *id.* at 261 (“[F]rom the time when canon law became fully differentiated from theology, no secular studium of theology of any importance existed at Bologna. In the academic organization a faculty of theology had no place till 1364. The consequences of this constitutional peculiarity were of the highest importance. From the Schools of Bologna strictly theological speculation was practically banished, and with it all the heresy, all the religious thought, all the religious life to which speculation gives rise.”); Peter Stein, *Vacarius and the Civil Law, in Church and Government in the Middle Ages, Essays Presented to C.R. Cheney on His 70th Birthday* 126 (1976) (noting that immediate pupils of Irnerius concentrated their attention exclusively on civil law, ignoring canon law as unworthy of their attention, for any properly trained civilian lawyer should have been able to handle and harmonize the discordant authorities of canon law); see also Law and Revolution, *supra* note 8, at 130 (stating that newly developed canon law of the Church would not broaden the curriculum until the latter half of the twelfth century).

29. Commenting on this manuscript, Professor Helmholtz drew my attention to a more nuanced analysis, stating, “[I]t may be true that there was no connection between the two faculties, but this did not mean that lawyers knew nothing of theology. One does not find it often in the Commentaries, but it does appear.” Letter from R.H. Helmholtz, Ruth Wyatt Rosenson Professor of Law, University of Chicago Law School, to the author (Oct. 15, 2002) (on file with the *Fordham Law Review*). It would be interesting to explore further the historiography of the initial development of law schools, and particularly the extent to which the connection between the study of law and theology have been played down because of later theories of legal education as a technical science which leaves little room for religious reflection.

30. Here, too, advice to clergy to avoid excessive entanglement with secular affairs is an ancient Christian theme. See, e.g., 2 *Timothy* 2:4 (“In the army, no soldier gets himself mixed up in civilian life because he must be at the disposal of the man who enlisted him.”); Disciplinary Decrees, *supra* note 3, at 90 (Council of Chalcedon (451) Canon 3 prohibited clerics from involvement in secular administration except that regarding the guardianship of minors, and the care of widows, orphans and the defenseless.); Ernst Sachur, *The Influence of the Cluniac Movement, in The Gregorian*

from the Second Lateran Council, convened by Pope Innocent II in 1139, focused on concern about professional studies:

Moreover, the evil and detestable practice has grown, so we understand, whereby monks and canons regular, after receiving the habit and making their profession, are learning civil law and medicine with a view to temporal gain, in scornful disregard of the rules of their blessed teachers Benedict and Augustine. In fact, burning with the fire of avarice, they make themselves the advocates of suits; and since they have to neglect the psalmody and hymns, placing their trust in the power of fine rhetoric instead, they confuse what is right and what is wrong, justice and iniquity, by reason of the variety of their arguments. But the imperial constitutions testify that it is truly absurd and reprehensible for clerics to want to be experts in the disputes of law courts. We decree by apostolic authority that lawbreakers of this kind are to be severely punished.³¹

It is against this cultural backdrop that Bernard of Clairvaux took on some of the most interesting religious, political and legal questions of his time.

II. ADVICE FROM A “MODERN CHIMAERA”: BERNARD OF CLAIRVAUX

Medieval monastic culture might be the last place one would look for insight into the developing legal profession. Instead, Bernard's writings reveal a surprising openness, breadth and flexibility that

Epoch: Reformation, Revolution, Reaction? 15 (Shafer Williams ed., 1964) (discussing Pope Gregory VII's eleventh-century church reforms which reaffirmed the importance of “a clergy free from all vices and devoting itself completely to the service of the church . . . and recognizing implementation included efforts to limit priests' involvement with secular cases). See generally Ralph V. Turner, *Clerical Judges in English Secular Courts: The Ideal Versus the Reality*, 3 *Medievalia et Humanistica: Studies in Medieval & Renaissance Culture* 75, 75 (1972) (discussing the tension between the ecclesiastical ideal of clergy remaining disentangled from worldly affairs in order to “care for souls” and the reality of their deep entanglement in secular affairs).

31. 1 Decrees of the Ecumenical Councils 198 (Norman P. Tanner ed.) [hereinafter Tanner] (Canons of the Second Lateran Council, 1139). This provision is identical to the prohibitions issued in the provincial Council of Clermont (1131). *Id.* at 198. Note that the same canon also includes prohibitions against the study of medicine, for somewhat different reasons:

There are also those who, neglecting the care of souls, completely ignore their state in life, promise health in return for hateful money and make themselves healers of human bodies. And since an immodest eye manifests an immodest heart, religion ought to have nothing to do with those things of which virtue is ashamed to speak. Therefore, we forbid by apostolic authority this practice to continue, so that the monastic order and the order of canons may be preserved without stain in a state of life pleasing to God, in accord with their holy purpose. Furthermore, bishops, abbots and priors who consent to and fail to correct such an outrageous practice are to be deprived of their own honours and kept from the thresholds of the church.

Id.

enlightens some of the timeless themes of legal ethics.³² This section will explore the specific background of Bernard's life and the text which is the focus of the analysis. The next section will probe the text's commentary on specific themes in legal ethics.

Born in 1090, just five years after the death of Pope Gregory VII, Bernard was raised in Burgundy, France, the heartland of reform monasticism.³³ In the tenth century, the monastery at Cluny was itself an expression of reform and a faithful return to the Benedictine rule.³⁴ By the twelfth century, however, elaborate liturgies and indulgence in rich food and drink called for its own reform. Robert of Molesme founded the monastery at Citeaux so the monks could live, as Louis J. Lekai describes, "an ascetic life in poverty and perfect solitude, providing for themselves, like the Apostles of Christ, through their own labor."³⁵

In 1113, at the age of twenty-three, Bernard entered the monastery at Citeaux, bringing with him thirty others, including several members of his family. Shortly thereafter, in 1115, he was appointed abbot of a new monastery in Clairvaux. Clearly a skilled and charismatic leader, Bernard was called upon to help resolve some of the most difficult crises and tensions of his time, including the disputed papal election of 1130.³⁶ In 1146, he was called on by the Pope to preach the Second Crusade.³⁷

All of this work brought Bernard, to his dismay, out of the monastery into the tangle of worldly affairs. As he expressed in a letter to the Carthusian Prior of Portes:

32. See, e.g., Joel Lipkin, *The Entrance of the Cistercians into the Church Hierarchy 1098-1227: The Bernardine Influence*, in *The Chimaera of His Age: Studies on Bernard of Clairvaux* 62 (Rozanne Elder & John R. Sommerfeldt eds., 1980) ("Perhaps the most perplexing aspect of Bernard of Clairvaux's mentality was his ability to combine, without any apparent tension, an intense spirituality and a practical grasp of political reality."); see also Evans, Bernard of Clairvaux, *supra* note 11, at 152-53 (discussing the "immensely pragmatic, this-worldly dimension" of Bernard's political theology).

33. On Consideration, *supra* note 15, at 5; see also Evans, Bernard of Clairvaux, *supra* note 11, at 7 (describing the "experimentation in the religious life" which permeated the culture of Bernard's time: "[M]onks and canons should be of one mind in singleness of purpose in the Christian life, but they need not adopt a single *style* or *form* of life."). For a concise and helpful historical overview of monasticism, see generally Fabio Ciardi, O.M.I., *Koinonia: Spiritual and Theological Growth of the Religious Community* (2002) [hereinafter *Koinonia*], particularly Part II: Historical Understanding. For an excellent overview of Bernard of Clairvaux's theology, see generally Evans, Bernard of Clairvaux, *supra* note 11.

34. See *Law and Revolution*, *supra* note 8, at 88-94 (providing a general background on the Cluniac reform); *Koinonia*, *supra* note 33, at 117-26 (briefly describing Benedictine monastic life).

35. Lekai, *supra* note 6, at 14.

36. Evans, Bernard of Clairvaux, *supra* note 11, at 13-14.

37. *Id.* at 16-17.

May my monstrous life, my bitter conscience, move you to pity. I am a sort of modern chimaera, neither cleric nor layman. I have kept the habit of a monk, but I have long ago abandoned the life. I do not wish to tell you what I dare say you have heard from others: what I am doing, what are my purposes, through what dangers I pass in the world, or rather down what precipices I am hurled. If you have not heard, enquire and then, according to what you hear, give your advice and the support of your prayers.³⁸

This uneasiness with a life of tension between the “world” and the monastery permeates the text of *De Consideratione* (“*On Consideration*”),³⁹ Bernard’s series of letters of advice to Eugenius III, his own student and fellow Cistercian, who was elevated to the Papacy in 1145.⁴⁰ Throughout the text, he confronts the dilemma of how an active life in the “world” can be led with a “proper Christian set of priorities.”⁴¹

Bernard was not particularly happy with Eugenius’s appointment. In a letter to the Roman Curia, he complained:

Had you no other wise and experienced man amongst you who would have been better suited for these things? It certainly seems ridiculous to take a man in rags and make him preside over princes, command bishops, and dispose of kingdoms and empires. Ridiculous or miraculous? Either one or the other.⁴²

Part of Bernard’s concern seems to have stemmed from Eugenius’s particular nature:

I am not happy in my own mind, for his nature is delicate, and his tender diffidence is more accustomed to leisure than to dealing in great affairs. I fear that he may not exercise his apostolate with sufficient firmness. What do you think will be the feelings of a man who from the secrets of contemplation and the sweet solitude of his heart, suddenly finds himself plunged into a vortex of great affairs, like a child suddenly snatched from his mother’s arms, like a sheep being led to sacrifice and finding itself in unfamiliar and unwelcome surroundings?⁴³

Thus he asked the Curia to support him in the “excessive and unaccustomed load, formidable even for a giant, even for the very angels themselves.”⁴⁴ Bernard’s personal concern for Eugenius as his own spiritual son and fellow monk permeates *On Consideration*,

38. The Letters of Saint Bernard of Clairvaux 402 (Bruno Scott James trans., Cistercian Pub. 1998) [hereinafter Letters].

39. On Consideration, *supra* note 15.

40. See Evans, Bernard of Clairvaux, *supra* note 11, at 151.

41. *Id.*

42. Letters, *supra* note 38, at 385-86.

43. *Id.* at 386.

44. *Id.*

giving the text a particular tone of intimate and sometimes urgent candor.

A. *Lessons in Papal Time Management*

Part of the reason that Eugenius, “the most harried administrator in western Christendom,”⁴⁵ was submerged with work was the pressure of hearing litigation. Bernard gently admonished:

I ask you, what is the point of wrangling and listening to litigants from morning to night? And would that the evil of the day were sufficient for it, (Mt. 6:34) but the nights are not even free! Your poor body scarcely gets the time which nature requires for rest before it must rise for further disputing. One day passes on litigation to the next, one night reveals malice to the next, (Ps. 18:3) so much so that you have no time to breathe, no time to rest and no time for leisure.⁴⁶

Within this context, Bernard’s subtle jab against the litigants’ “evil of the day” seems less a function of critique of the legal profession and more an expression of delicate and personal concern for Eugenius’s physical health.

Many of Bernard’s seeming barbs against lawyers might be best understood as practical lessons in “papal time management” rather than a critique of the legal profession per se. “It is one thing to rush headlong into these affairs when there is an urgent reason, but it is another, entirely, to dwell on them as if they were important and worthy of this kind of papal attention.”⁴⁷

The tangle of legal affairs is not necessarily an evil in itself, but becomes a concern when it absorbs so much of the Pope’s attention that it detracts from his duties as the successor of Peter:

Clearly your power is over sin and not property, since it is because of sin that you have received the keys of the heavenly kingdom, to exclude sinners not possessors. The Lord confirms this when he says, ‘that you may know that the Son of Man has power on earth to forgive sins.’ (Mt. 9:6). Tell me, which seems to you the greater honor and greater power: to forgive sins or to divide estates?⁴⁸

Against the backdrop of the Cistercian reform, Bernard’s suggestions to Eugenius are not surprising: keep involvement in litigation to a minimum. He advised:

45. On Consideration, *supra* note 15, at 16 (“In undertaking to advise Eugene, Bernard addressed a man existing at the center of an unbearable paradox. The pope was at the same time a Cistercian monk and the most harried administrator in western Christendom.”).

46. *Id.* at Book 1:4.

47. *Id.* at Book 1:8.

48. *Id.* at Book 1:7.

Therefore, let it be your custom to become involved in only those cases where it is absolutely necessary (and this will not be every case) and decide them carefully but briefly, and to avoid frustrating and contrived delays. The case of a widow requires your attention, likewise the case of a poor man and of one who has no means to pay. You can distribute many cases to others for judgment and many you can judge unworthy of a hearing. What need is there to hear those whose sins are manifest before the trial?⁴⁹

Each of these aspects of Bernard's critique probe not so much the heart of the legal profession as the specific challenge to Eugenius to order his attention and his time according to his role as a spiritual leader.

B. *Respect for the Regnum*

Certain passages in Bernard's letters describe "worldly" affairs as lower in the hierarchy of concerns: "These base worldly concerns have their own judges, the kings and princes of the world."⁵⁰ Yet, they would also seem to imply a certain respect for the "work" within the "territory" of others. As Bernard questions, "Why do you invade someone else's territory? Why do you put your sickle to someone else's harvest? Not because you are unworthy, but because it is unworthy for you to be involved in such affairs since you are occupied by more important matters."⁵¹ While the passage leaves no doubt about which realm is superior, a clear distinction between *sacerdotum* and *regnum* did not necessarily denigrate the "harvest" of the *regnum*.

In an earlier letter to the monk Adam, dated about 1125, Bernard's discussion of lay vocations also indicates his profound respect for the diverse ways in which the "good" may be manifest, depending on one's vocation and on the context:

Now so that you may understand me you must know that there are some things wholly good and others wholly evil. . . . And between these two extremes there are middling things; things neither good nor evil, but indifferent. And these things derive their character of goodness or badness from the circumstances of manner, place, and time. . . . [S]ome middle things can often become either wholly good or wholly evil. Thus marriage is neither enjoined nor forbidden; but

49. *Id.* at Book 1:13.

50. *Id.* at Book 1:7.

51. *Id.* at Book 1:7. This respect for "lay territory" is also prominent in the Fourth Lateran Council in 1215. *See, e.g.,* Disciplinary Decrees, *supra* note 3, at 274 (English translation of Canon 42: "As desirous as we are that laymen do not usurp the rights of clerics, we are no less desirous that clerics abstain from arrogating to themselves the rights of laymen. Wherefore we forbid all clerics so to extend in the future their jurisdiction under the pretext of ecclesiastical liberty as to prove detrimental to secular justice; but let them be content with the laws and customs thus far approved, that the things that are Caesar's may be rendered to Caesar, and those that are God's may by a just division be rendered to God.").

once contracted it cannot be dissolved. What, therefore, before the nuptials was clearly a middling thing, after them becomes, for the persons married, a thing wholly good. Likewise, whether a secular person should hold property or not is a matter of indifference; but for a monk it is wholly evil, for he is not permitted to hold any property at all.⁵²

Read in this light, Bernard's critique of the legal profession is not a blunt recommendation to flee from the world. In his sermons he explicitly acknowledged the benefits of specialized knowledge.⁵³

Bernard also explicitly recognized the necessity of some system of litigation to resolve disputes and address injustice:

Fraud, deceit and violence run rampant in our land. False accusers are many; a defender is rare. Everywhere the powerful oppress the poor. We cannot abandon the downtrodden; we cannot refuse judgment to those who suffer injustice. (Ps. 102:6; 145:7). If cases are not tried and litigants heard, how can judgment be passed?⁵⁴

Indeed, a profound appreciation and respect for legal procedure permeates the text of *On Consideration*.⁵⁵ For example, appeals to the Pope may be a unique occasion for justice: "What could be as fitting as this: that the invocation of your name liberates the oppressed and leaves the crafty with no refuge?"⁵⁶ On the other hand, Eugenius must take care to assure that the process is not abused. The "law of appeals itself" requires that one who appeals without cause be dealt with "so that he repents of having done what he did not fear to do, and so that he cannot mock the punishment of the innocent."⁵⁷ Bernard is relentless in his care for even the minutia of justice, such as the reimbursement of costs: "In the frequent appeals which are made today, can you name for me anyone who has even reimbursed the

52. Letters, *supra* note 38, at 28; see also *On Consideration*, *supra* note 15, at Book 5:12 ("God accomplishes different ends through different spirits."). See generally John R. Sommerfeldt, *The Social Theory of Bernard of Clairvaux*, in *Studies in Medieval Cistercian History* 38-46 (1971).

53. See M. Basil Pennington, *Bernard of Clairvaux: A Lover Teaching the Way of Love* 114-16 (1997) (translation of *On the Song of Songs* 36:2-3: "All knowledge is good in itself provided it be founded on truth . . ."); see also Evans, *Bernard of Clairvaux*, *supra* note 11, at 49 (discussing Bernard's respect for specialized knowledge).

54. *On Consideration*, *supra* note 15, at Book 1:13.

55. See generally Evans, *Bernard of Clairvaux*, *supra* note 11, at 146-49 (summarizing Bernard's discussions of legal procedure); Brand, *supra* note 17, at 5-13 (stating that analysis of the *Legis Henrici Primi* indicates that litigation did not call for much specialist expertise).

56. *On Consideration*, *supra* note 15, at Book 3:6; see also *id.* at Book 3:10 ("[D]o not think you are wasting time if you consider how you can return appeals to their legitimate use, if this is possible. . . . I admit that appeals are a great and general good for the world and that they are as necessary for men as the sun itself: truly, indeed, the right of appeal is the sun of justice (Mal. 4:2) which appears and rebukes the world of darkness.").

57. *Id.* at Book 3:6, 3:7.

money for the expense of the journey to the person against whom he had appealed?"⁵⁸

Thus Bernard's critique seems to be framed, for the most part, in terms of the manner in which litigation is handled, not of litigation or of the legal profession in and of itself.⁵⁹ As Bernard admonished, "Let cases be tried, but in a suitable manner. The way which is frequently followed now is completely detestable."⁶⁰

III. A TIMELESS AND TIMELY CRITIQUE

A. A Two-Step Leap

To fully appreciate the importance and value of the mid-twelfth century religious critique of the legal profession, and Bernard of Clairvaux's particular critique, one must make a two-step leap of reason and faith. The first step is to move beyond the not uncommon stereotype of the "Dark Ages" as a time in which "the normal use of natural reason was obscured by blind faith,"⁶¹ awaiting the dawn of more "rational" state-imposed professionalized mechanisms for dispute resolution.

One of the pioneers in the intellectual groundwork to bridge the chasm between law and religion, Harold Berman, eloquently challenges:

If we see law in dictionary terms merely as a structure or "body" of rules laid down by political authorities, and similarly see religion merely as a system of beliefs and practices relating to the supernatural, the two seem connected with each other only very distantly or in only a few rather narrow and specific respects. But in reality both are much more than that. Law is not only a body of rules; it is people legislating, adjudicating, administering, negotiating—it is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose in life—it is a shared intuition of and commitment to transcendent values.⁶²

Reconceptualizing both law and religion and the connection between the two opens up a broader horizon, shedding light on how

58. *Id.* at Book 3:9.

59. See Evans, Bernard of Clairvaux, *supra* note 11, at 146 (commenting that this text echoes contemporary legal thinking: "justice is above all a device for ensuring that the strong do not always win").

60. On Consideration, *supra* note 15, at Book 1:13.

61. See Etienne Gilson, *Reason and Revelation in the Middle Ages* 3-4 (1938).

62. Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* 3 (1993).

medieval procedures for dispute resolution, which also wove in religious values, made workable sense.⁶³

The second step is to move beyond a stereotype that defines the source of cultural energy and creativity as severing secular society's links to the religious.⁶⁴ If medieval monastic life is considered not "technically human,"⁶⁵ Bernard of Clairvaux's critique would be of little relevance for us today. Instead, as a matter of historical accuracy, it is important to note that medieval monasteries were deeply involved in and committed to the life of the societies that surrounded them.⁶⁶ Further, by acknowledging that religious experience may actually open the door to a more profound understanding of depths of human experience, one discovers a treasure trove of resources to mine for profound reflection on the most difficult themes in legal ethics.

B. *A Religious Vision of Lawyers as Public Servants*

The idea that the "spirit of public service" should permeate the legal profession's commitment to the broader society is an enduring theme in legal ethics,⁶⁷ thus it is not a shock to find its roots at the dawn of the modern legal profession. What may be surprising is to see how well-developed and balanced are the medieval reflections on this theme. The medieval critiques hinge on two concepts: first, an appreciation of knowledge as a gift which entails public responsibilities; and second, condemnation of the vices of greed and ambition which distort the ways in which knowledge may be used for the service of the larger community.

63. For a brilliant discussion of this theme, see *The Settlement of Disputes in Early Medieval Europe* 214 (Wendy Davies & Paul Fouracre eds., 1986) [hereinafter Davies] ("The particular forms of procedure used in the settlement of disputes do not represent arbitrary practices at all; they are, above all, historically comprehensible. Procedure in all our societies may be loosely described as customary, but the customs of each society reflect its particular historical development."); *id.* at 215 ("Of determinant importance to the development of dispute settlement procedures in all societies was the church. . . . [I]n all societies the practice of law was permeated with a sense of accountability to God. This served both to limit and license the activities of courts."); *id.* at 228 ("The results we have obtained show that the process of dispute was very unlike that of the traditional picture. We can see that, although the law codes do have some practical reality, they are over-schematic; legal practice was more matter-of-fact than has been recognized by many legal historians. Even ritual, cornerstone of the conventional view of early medieval irrationality, fitted clearly into a social context that gave it meaning.").

64. See *supra* text accompanying notes 16-20.

65. Brown, *supra* note 5, at 319.

66. See generally Lekai, *supra* note 6, at 378-80 (describing the fruitful interaction and vital link between monasteries and their surrounding secular environments); sources discussed *infra* at note 100.

67. See, e.g., In the Spirit of Public Service, *supra* note 1, at 10 (discussing how the "spirit of public service" should be the hallmark of the legal profession).

1. Knowledge Entails Public Responsibilities

Throughout the middle ages, in a variety of cultures, a common and consistent theme is that legal knowledge entails responsibilities to the public as a whole.⁶⁸ Bernard also recognized that knowledge is a talent to be used and developed. As he wrote to the Archbishop elect of Cologne, "You might do wrong if you did not put the talent of knowledge which has been committed to you to use."⁶⁹ Bernard was certainly not averse to using the arts in public service. As he reflected in his sermons on the Song of Songs:

I am not unmindful of the benefits scholars of the study of letters conferred and still confer on the Church . . . I have read the text: "As you have rejected knowledge, so do I reject you from my priesthood" and that "the learned will shine as brightly as the vault of heaven and those who have instructed many in the ways of virtue as bright as stars for all eternity."⁷⁰

He acknowledged that there are those who long to know in order to be of service, "and this is charity."⁷¹

Further, as discussed above, Bernard also recognized the importance of legal process as a tool to help those who suffer injustice, particularly the poor: "We cannot abandon the downtrodden; we cannot refuse judgment to those who suffer injustice. (Ps. 102:6; 145:7). If cases are not tried and litigants heard, how can judgment be passed?"⁷²

68. Compare, for example, two lawyers, Njal and Eyolf, in a celebrated medieval Icelandic Saga: "Njal was so great a lawyer that his match was not to be found. Wise too he was, and foreknowing and foresighted. Of good counsel, and ready to give it, and all that he advised men was sure to be the best for them to do. . . . [He] unraveled every man's knotty points who came to see him about them." When one of his friends considered asking for his advice, he reflected, "Tis like enough he will give me good advice, as he gives it to every one else." The Story of Burnt Njal n.20 (Sir George Webbe Dunsen trans., 1971). Eyolf was also recognized as a skilled lawyer, "some said he was the third best lawyer in Iceland." In contrast to Njal, however, "you will need to give him much money if you are to bring him into the suit." After accepting a pricey ring at the initial consultation, Eyolf requested, "Be most careful not to say that ye have given goods for my help"—perhaps reflecting a certain social opprobrium. *Id.* at n.137. For careful analysis of the legal themes which arise in the medieval Icelandic Sagas, see generally, William Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland* 221 (1990) (describing law and legal process), and Richard A. Posner, Book Review, *Medieval Iceland and Modern Legal Scholarship*, 90 Mich. L. Rev. 1495 (1992).

69. See Evans, Bernard of Clairvaux, *supra* note 11, at 43 (quoting reply to Bruno, Letter 77.1).

70. Pennington, *supra* note 53, at 114-15 (translation of Sermon on the Song of Songs, 36:2-3).

71. *Id.* at 116.

72. On Consideration, *supra* note 15, at Book 1:13; see discussion *supra* note 33. See generally James A. Brundage, *Legal Aid for the Poor and the Professionalization of Law in the Middle Ages*, 9 J. Legal Hist. 169, 175 (1988) (tracing the medieval roots of legal aid to the poor, concluding, "Providing the benefits of expert skill and

However, much depends on the spirit with which learning is approached. When acquisition of knowledge is aimed only at self-aggrandizement and wealth, Bernard's critique is venomous. Much of his spiritual writing is dedicated to identifying the steps down the ladder of pride that lead the soul away from God. One of the first steps is vain *curiositas*, a trivial, irresponsible, and unworthy inquiry.⁷³ As he colorfully describes in one of his sermons:

For there are some who long to know for the sole purpose of knowing and that is shameful curiosity; others who long to know in order to become known and that is shameful vanity. To such as these we may apply the words of the Satirist, 'Your knowledge counts for nothing unless your friends know you have it.'⁷⁴

Further, removing the quest for knowledge from the context of intent to serve the community distorts one's understanding. As he describes in the *Steps of Humility and Pride*, "[K]nowledge of truth is to be found at the 'summit of humility.'"

Yes, the way of humility is a good way. Its seeks for truth, it wins charity, it shares the fruits of wisdom. Just as the end of the Law is Christ, so the perfection of humility is the knowledge of truth. When Christ came he brought grace; when truth is known it brings love. To the humble it is known. "He gives his grace to the humble."⁷⁵

One of Bernard's contemporaries, Maurice of Saint-Victor, aptly expressed the critique against lawyers who "seek knowledge not to become wise but to prostitute themselves venally for men's praise or for money. Thus, being unworthy of knowledge, they never truly attain it."⁷⁶

knowledge for those to whom a profit economy would deny them was from the beginning an integral characteristic of professional status.").

73. See Evans, Bernard of Clairvaux, *supra* note 11, at 49; *id.* at 39 (describing the steps down the Bernard's ladder of pride, the first being "*curiositas*"—the urge to know things one should not know, as such will lead one astray from concentration on the things of God); Evans, *The Mind*, *supra* note 11, at 163 (noting that in *De Gradibus Humilitatis*, Bernard dedicates as much space to *curiositas* as to the other eleven degrees of pride together). See generally Pennington, *supra* note 53, at 45-61 (selections from *The Steps of Humility and Pride*).

74. Pennington, *supra* note 53, at 115 (translation of *On the Song of Songs*, 36:2-3); see also Evans, Bernard of Clairvaux, *supra* note 11, at 50 (discussing the same).

75. Pennington, *supra* note 53, at 47 (translation of *The Steps of Humility and Pride*); see also *id.* at 64 (translation of *The Steps of Humility and Pride*: commenting on the scripture passage, remove the beam from your own eye and then you will see better to cast the mote from your brother's: "The heavy, thick beam in the eye is pride of heart. It is big but not strong, swollen but not solid. It blinds the eye of the mind and blots out the truth.").

76. See Bellomo, *supra* note 19, at 114-15.

2. Greed and Ambition Distort Knowledge

A second and intertwined element of Bernard's critique is that the vices of greed and ambition block the capacity to put legal knowledge at the service of others. As R.H. Helmholz identifies, the effect of money on the outcome of litigation is "the subject related to legal ethics that figures most prominently and repeatedly in the annals of time."⁷⁷

Because knowledge was considered a divine gift, some medieval critics questioned whether lawyers should be paid at all. As the mid-twelfth-century canonist Gratian observed in the *Decretum*, justice is a gift of God, and "he who sells or purchases a gift of God is condemned by God."⁷⁸

But here, too, the tradition includes a well-developed and sophisticated balance. Contrary to older Roman custom, there was no blanket prohibition against charging a fee.⁷⁹ Medieval canonists recognized that advisors were entitled to earn a living, citing the Gospel of Luke: "the labourer deserves his hire."⁸⁰ Building on St. Augustine's distinction between legal representation or advice on one hand, and justice on the other, they concluded that the advocate was not paid for justice, but for labor—the skilled advice and representation in resolving conflicts.⁸¹

However, crossing the line into the vices of greed and ambition signals danger for both the individual soul and the integrity of the profession. Bernard spares no venom in his colorful critique of the

77. R.H. Helmholz, *Money and Judges in the Law of the Medieval Church*, 8 U. Chi. L. Sch. Roundtable 309, 309 (2001); see also R.H. Helmholz, *Ethical Standard for Advocates and Proctors in Theory and Practice*, in *Canon Law and the Law of England* 41, 43-51 (1987) (discussing the evidence of canon lawyer's greed in the later medieval church courts); Brundage, *Ethics*, *supra* note 2, at 240-41 ("Lawyers' fees were almost universally denounced as excessive, and there was general agreement that it was better for a man to fall in with thieves than to sue in the courts.").

78. Gratian, *Decreti Para Secunda*, Causa I, Quest. III. c 10 ("Qui dona Dei vendunt cel emunt pariter a Deo Damnantur."). To search the 1879 Friedbergs edition of Gratian's texts on line, visit the Bayerische Staats Bibliothek website: <http://mdz.bibbv.de/digbib/gratian/text>. See generally Gaines Post, Kimon Giocarinis & Richard Kay *The Medieval Heritage of a Humanistic Ideal: "Scientia Donum Dei Est, Unde Vendi Non Potest,"* 11 *Traditio* 195 (1955) (thorough discussion of the medieval ideal of knowledge as a gift of God that should not be sold (*scientia donum Dei est, unde vendi non potest*), as well as Greek and Patristic parallels).

79. For thorough scholarship on this topic, see James A. Brundage, *Contingent Fees and the Ius Commune*, 87 *Kanonistische Abteilung* 125 (2001), Brundage, *Ethics*, *supra* note 2, at 245-47 (discussing history of advocates' fees), and James A. Brundage, *The Profits of the Law: Legal Fees of University-Trained Advocates*, 32 *Am. J. Legal Hist.* 1 (1988) [hereinafter Brundage, *Profits*].

80. *Luke* 10:7.

81. Brundage, *Profits*, *supra* note 79, at 3-4; see Baldwin, *supra* note 2, at 193 (discussing the distinction between illicit judicial simony and licit advocate's fees); Evans, *Law and Theology*, *supra* note 13, at 62-63. See generally *id.* at 61-68 (summarizing medieval sources on the professional advocate's role).

greed and ambition in his time: "The Church is filled with ambitious men; in our age she shudders at the calculated strivings of ambition no more than a den of thieves shudders at the spoils taken from travellers. (Mt. 21:13)."⁸² Thus he warns Eugenius, "Does your palace not resound all day with the voices of ambition? Is it not for its profit that all learning of the laws and canons is sweated over?"⁸³

In context, Bernard's critique is less a condemnation of the intrinsic nature of the legal profession, and more a call to heed the ways in which pride, ambition, and greed may distort true knowledge which aims to serve one's neighbor. His balanced approach to the use of knowledge may be summarized in a passage from one of his sermons:

It implies the order, the application, and the sense of purpose with which one approaches the object of study. The order implies that we give precedence to all that aids spiritual progress; the application, that we pursue more eagerly all that strengthens love more; and the purpose, that we pursue it not through vainglory or inquisitiveness or any base motive but for the welfare of oneself or one's neighbor.⁸⁴

Temptations to pride, greed and ambition are certainly not modern phenomena, and of course not limited to the legal profession. In our modern search for cures to these maladies, and ultimate sources of balance and restraint, religious and spiritual texts, both ancient and modern, may provide substantive guidance.

C. A Religious Rationale for the Limits of Advocacy

1. Medieval Reflections on an Ancient Tension

Much of Bernard's critique of the legal profession focuses on the tension between the advocacy required to represent one's client and dedication to the truth. The theme is an ancient one in philosophical and theological reflection.⁸⁵ Christian theology includes a number of

82. On Consideration, *supra* note 15, at Book 1:13; *see also* Evans, Bernard of Clairvaux, *supra* note 11, at 141 (stating that the ambitious were anxious to obtain the "professional exposure from being seen as an advocate in a case where the pope was judge").

83. On Consideration, *supra* note 15, at Book 3:5; *see* Bellomo, *supra* note 19, at 114 (discussing the same); Pennington, *supra* note 53, at 115-16 (translation of *On the Song of Songs* 36:2-3: "There are still others who long for knowledge in order to sell its fruits for money or honors, and this is shameful profiteering."); *see also* C.H. Haskins, *The Renaissance of the Twelfth Century* 216 (1957) ("[C]anon law was stigmatized as a lucrative profession for which men deserted the higher but less remunerative subject of theology."). *See generally*, John W. Baldwin, *Critics of the Legal Profession: Peter the Chanter and His Circle*, in *Proceedings of the Second International Congress of Medieval Canon Law* 249-59 (Stephen Kuttner & J. Joseph Ryan eds., 1965).

84. Pennington, *supra* note 53, at 115 (translation of *On the Song of Songs* 36:2-3).

85. *See e.g.*, Plato's *Gorgias* 14 (W.C. Helmhold trans., The Liberal Arts Press, 1952) (Socrates' critique of rhetoric as "a persuasion which can produce belief about

rich metaphors for the advocate's role. References to Christ as an advocate for humanity are common; the Holy Spirit is also referred to as the divine advocate.⁸⁶ Advocacy on behalf of the poor is a common theme.⁸⁷ Loyalty, reliability, and purposeful partiality were all recognized as essential to the advocate's duties.⁸⁸

As discussed above, Bernard had a keen eye for the importance of legal process and how it may work towards the end of justice.⁸⁹ But he also saw clear limits to advocacy. The vigor of his critique is best understood against the broader backdrop of his whole spirituality which is based on the search for truth.⁹⁰ Bernard insisted that, "All knowledge is good in itself provided it be founded on truth."⁹¹ Commenting on a verse from the Song of Songs about the Bride seeking the Beloved, the soul seeking Truth, Bernard writes:

I am endowed with reason. I have a capacity for truth, but it would be better if I did not. The love of truth is the very root of intelligence. I am in danger if I do not have it. There is not doubt that in this love of truth, which makes me superior to all other living beings, the distinctive sign of the divine image shines forth eminently.⁹²

Other aspects of Bernard's long and colorful career, particularly his debates with Peter Abelard, another brilliant theologian of his day, highlight Bernard's suspicion of "formal" modes of reasoning, "unless it is conducted in the loving spirit of a seeker after truth whose eyes are fixed on God."⁹³

Against this backdrop, it is not surprising that Bernard saves much of his venom for a cutting critique of how lawyers' arguments subvert the truth.

justice and injustice, but cannot give instruction about them"). I am indebted to both Mark Sargent and W. Bradley Wendel for highlighting the rich parallels between Bernard's and Socrates' critiques, a topic that would certainly merit further scholarship.

86. *John* 16:7 ("[U]nless I go, the Advocate will not come to you; but if I do go, I will send him to you."); see Evans, *Law and Theology*, *supra* note 13, at 62 (discussing the same).

87. Evans, *Law and Theology*, *supra* note 13, at 62; see *supra* note 72 and accompanying text.

88. Evans, *Law and Theology*, *supra* note 13, at 63.

89. See *id.* at 62; see also *supra* notes 55-58.

90. Charles Dumont, O.C.S.O., *Pathway of Peace: Cistercian Wisdom According to Saint Bernard* 44 (Elizabeth Connor, O.C.S.O., trans., 1999). See generally *id.* at 43-49 (discussing spirituality and truth).

91. Pennington, *supra* note 53, at 115.

92. See also Dumont, *supra* note 90, at 45 (quoting Sermon 77 *On the Song of Songs*).

93. Evans, Bernard of Clairvaux, *supra* note 11, at 43; see also *id.* at 43 ("Bernard was impatient with verbal subtleties of a type different from his own. He describes Abelard's reasoning as a war of words (*pugnae verborum*) marred by novelties of expression (*novitates vocum*).").

I am astonished that you, a man of piety, can bear to listen to lawyers dispute and argue in a way which tends more to subvert the truth than to reveal it. . . . These men have taught their tongues to speak lies (Jer. 9:5). They are fluent against justice. They are schooled in falsehood. They are wise in order to do evil; they are eloquent to assail truth. . . . These it is who instruct those by whom they should have been taught, who introduce not facts but their own fabrications, who heap up calumny of their own invention against innocent people, who destroy the simplicity of truth, who obstruct the ways of justice.”⁹⁴

In another passage, his suggested method to “[r]eform this corrupt tradition” would render the lawyers silent: “cut off their lying tongues and shut their deceitful mouths. (Ps. 11:4).”⁹⁵ Other lines are a bit more gentle, suggesting that there might be room for argument in a way that does not subvert the truth: “Nothing reveals the truth so readily as a simply straightforward presentation.”⁹⁶

Overall, however, Bernard’s contrast between the “laws of Justinian” and the laws of the Lord seems to leave the two worlds far apart:

Oh yes, every day laws resound through the palace, but these are the laws of Justinian, not of the Lord. Is this just? Consider for a moment. Surely, the Law of the Lord is perfect, converting souls. But these are not so much laws as wrangling and sophistry, subverting judgment. Tell me, therefore, how can you, as bishop and shepherd of souls, allow the Law to stand silent before you while these others rattle on? I am at a loss if this perversity does not cause you anxiety. I think that sometimes this should cause you to cry with the Prophet to the Lord, “Evil people have told me tales, but they are not like your Law.”⁹⁷

Such a line of analysis echoes the Second Lateran Council’s scathing critique: lawyers “confuse what is right and what is wrong, justice and iniquity” *by reason of* “the variety of their arguments.”⁹⁸

Of all the critiques, this line of analysis seems to cut deepest into the heart of the legal profession’s timeless ethical dilemma: is betrayal of the truth intrinsic to the assumption of an advocate’s role? Under Bernard’s analysis, is advocacy, as we understand it in today’s legal profession, doomed? Should this aspect of Bernard’s analysis, particularly his dedication to Truth with a capital “T” be written off as

94. On Consideration, *supra* note 15, at Book 1:13.

95. *Id.*; see also Baldwin, *supra* note 2, at 193 (discussing Peter the Chanter’s critique in the latter twelfth century, “just as the prostitute sets a price on her bodily members so the lawyer sells his tongue”).

96. *Id.* at Book 1:13.

97. *Id.* at Book 1:5.

98. Tanner, *supra* note 31, at 198 (emphasis added); see *supra* note 31 (discussing the Second Lateran Council).

too arcane to be relevant for the challenges of today's legal profession?

2. Three Avenues for Further Inquiry

Before this aspect of Bernard's analysis is dismissed, three avenues of further inquiry, building on well-laid foundations, may be worthy of consideration.

a. *Further Analysis of the Room for a "Variety of Arguments" in Twelfth-Century Legal Procedure*

One might be tempted to box Bernard's analysis into a stereotype of the medieval mind as rigid and inflexible in its monolithic sense of truth, with little patience for and appreciation of "the variety of arguments." After all, what could we expect from a pre-rational society that continued to turn to the ordeal, a trial by fire or water, in cases of uncertain proof?⁹⁹

Paradoxically, twelfth-century conceptions and methods for discovering "truth" may be an area in which further research could be most fruitful for discussions about the legal profession's commitment to truth. Recent studies of the uses of the ordeal reveal an extraordinary procedural sophistication that not only allowed room for a variety of arguments, but also for forging genuine community consensus.¹⁰⁰ Building on the already thoughtful scholarship in this area may add an interesting layer to an analysis of Bernard's reflections.

b. *Further Exploration of Religiously Mediated "Alternative Dispute Resolution"*

Further inquiry into medieval alternatives to the "wrangling and sophistry" of the "laws of Justinian" also opens the horizon to the fascinating contours of religiously mediated alternative dispute resolution. Stephen D. White's careful studies of monasteries' roles in

99. See, e.g., Robert Bartlett, *Trial by Fire and Water* 34 (1984) (outlining and subsequently challenging the "standard argument" that the abandonment in the thirteenth century was part of the rationalization of proof in Europe: "modernization demanded by more advanced social structures and a higher intellectual level"). See also discussion *supra* note 3.

100. See, e.g., Davies, *supra* note 63, at 222 (discussing how the medieval ordeal was often a "ritualized version of community decisions," expressing "group solidarities that were necessary for any successful action in any court"); Stephen D. White, *Proposing the Ordeal and Avoiding It: Strategy and Power in Western French Litigation, 1050-1110*, in *Cultures of Power* 89 (Thoman N. Bisson ed., 1995) (describing how proposals to use the ordeal were used to gain a tactical advantage in litigation). See generally Olson, *supra* note 3; Law and Revolution, *supra* note 8, at 57-58 (describing how the outcome of the ordeal was subject to community consensus and allowed room to maneuver in accord with practical community needs).

dispute resolution in eleventh- and twelfth-century France not only explode myths that medieval monasteries were completely removed from their surrounding social networks and disputes, but also highlight the positive and constructive values prized in twelfth-century culture: compromise, enduring relationships, and forgiveness.¹⁰¹ The initial research indicates that the seemingly “Dark Ages” could shed light on creative solutions to the irrational violence of our own adversarial system.¹⁰²

c. *Spirituality and Advocacy: Bernard's Invitation*

Perhaps the greatest invitation that Bernard's life and writings poses to a modern lawyer is to delve into his profound and creative spirituality to discover how his completely different perspective on “worldly affairs” may present not only relevant and refreshing challenges, but also interesting solutions.

For example, further exploration of Bernard's steps of truth might open an interesting window on models for the lawyer's role as an advocate. Discussing the order of the degrees of truth, Bernard explained,

First of all, truth teaches us that we must look for it in our neighbors before we seek it in itself. . . . The merciful quickly grasp the truth in their neighbors when their heart goes out to them with a love that

101. Stephen D. White, *Feuding and Peace-Making in the Touraine Around the Year 1100*, 42 *Traditio* 195, 208-09 (1986) (“[S]ince monks had an established obligation to mediate between human and supernatural beings and since they effectively mediated between living nobles and these people's dead kinsmen, it is not surprising that they were considered appropriate mediators under other circumstances.”); Stephen D. White, *Pactum . . . Legem Vincit et Amor Judicium: The Settlement of Disputes by Compromise in Eleventh Century Western France*, 22 *Am. J. Legal Hist.*, 281, 308 (1978) (concluding that “the marked tendency of disputants to choose concord rather than judgment was probably the outgrowth of existing social and political structures and of prevalent social attitudes”); see also Patrick Geary, *Living in Conflict in Stateless France: A Typology of Conflict Management Mechanisms, 1050-1200*, in *Living With the Dead in the Middle Ages* 128 (1994) (outlining medieval society's numerous nonlegal means of dealing with conflict, which appear to be evidence of anarchy “only when observed from a particularly narrow and formalist legal historical perspective”); Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 *Ohio St. J. on Disp. Resol.* 1 (1996) (discussing multiple dispute processing methods used in Anglo-Saxon England in the seventh through eleventh centuries, focusing on secular sources).

102. I have yet to find a discussion of the twelfth-century Cistercian monasteries' role in dispute resolution, but I suspect that material would be abundant. See Lekai, *supra* note 6, at 379 (“In spite of the fact that Cistercians did not wish to play any role in the feudal establishment, it seems that in cases when it was clearly to the benefit of their peasant neighbors, some abbots did assume the responsibility of a protector or advocate.”).

unites them so closely that they feel their neighbor's good and ill as if it were their own."¹⁰³

For those who become weak with the weak, rejoice with those who rejoice, and weep with those who weep, "[t]heir hearts are made more clear-sighted by love, and they experience the delight of contemplating truth, not now in others but in itself, and for the love of it they bear their neighbor's sorrow."¹⁰⁴

Texts such as these could provide a rich source of reflection on the advocate's role. Perhaps Bernard would appreciate a definition of advocacy along these lines: to enter into another's sorrow, and then with a heart made clear-sighted by love, to speak on his or her behalf. The possibilities are endless. Bernard extends a standing invitation.

CONCLUSION

It may be surprising to observe that the complexities, struggles and questions that the nascent legal profession faced in the twelfth century mirror in many ways the challenges we face today. How to curtail avarice and ambition in a lucrative profession that opens the door to public advancement and how to resolve the conflicting demands of advocacy and the truth are themes that pertain to the timeless struggles not only of the legal profession, but of human nature. An initial glimpse of the view from a mid-twelfth-century monastery suggests that it may provide helpful insight and guidance for today's efforts to define and maintain our professional commitments and values.

103. Pennington, *supra* note 53, at 62 (translation of the *Steps of Humility and Pride*).

104. *Id.*

Notes & Observations