Fordham Urban Law Journal

Volume 26 | Number 4 Article 4

1999

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Amelia J. Uelmen

CAN A RELIGIOUS PERSON BE A BIG FIRM LITIGATOR?

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Introduction

In certain mid-town Manhattan elevators, just coupling the words "religion" and "lawyering" is enough to stop conversations, turn heads and draw out comments of disbelief and intense curiosity. In the world of large corporate law firms, what could religion have to do with lawyering? To many business lawyers, religious values appear "personal" and so out of context.

Other kinds of legal practice seem to lend themselves much more readily to a direct application of personal and religious values. Providing direct legal services to the poor or the oppressed, for example, fits neatly with the convictions of those attentive to biblical admonitions to work for justice and to serve the needy.[1] Many who have gravitated towards public interest law can say with complete sincerity and coherence, "religion made me do it."[2] Areas of practice that involve counseling individual clients also seem to leave room for integrating personal and religious values into various aspects of the lawyer-client relationship. Particularly where legal counseling and advice involve personal matters, it is not difficult to imagine the potential for lawyer and client to form a

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1. *See, e.g.*, *Isaiah* 1:17 ("Seek justice, undo oppression; defend the fatherless, plead for the widow."); *Matthew* 25:31-46 ("Whatever you did for one of the least of these brothers of mine, you did it for me.").

2. Ashley T. Wiltshire, *Religion and Lifework in the Law*, 27 TEX. TECH. L. REV. 1383, 1383 (1996) ("For many of us who work for the poor or marginalized, the underlying motivation is there: religion made us do it. Truth to tell, the motivation is there whether we admit or not.").

"moral community" based on which they exchange information and make decisions.[3]

In contrast, service to the poor or marginalized is not usually the mission of the large corporate law firm. It is especially difficult, for an associate, to imagine creating a "moral community" with a corporate client. To those who would like to integrate personal and religious values into their lives as lawyers but find themselves practicing in a large firm, the common suggestion is to dabble in *pro bono* legal services to the poor or to organizations that serve the oppressed or downtrodden of society.[4] At least in this way, these lawyers can share in the areas of practice that leave room to integrate personal and religious values.

As for the day-to-day work at large firms, many have concluded that it is very difficult, if not impossible, to find spiritual meaning.[5] If you really want to be a person who fully integrates personal or religious values into your work, the suggestion is, more often than not, get out.[6] At a big firm, "religious lawyering" is an oxymoron.

Or is it? Does it have to be? In this Essay, I take on the challenge of describing some of the ways in which values often defined

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3. *See* Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 FORDHAM L. REV. 1101, 1121 (1998) (discussing "covenant" model of lawyer-client relationship in which each party affirms the others as loved by God, and each is answerable to the other). *See generally* JOSEPH ALLEGRETTI, THE LAWYER'S CALLING ch. 3 (1996) [hereinafter THE LAWYER'S CALLING] (contrasting contract with covenant model of lawyer-client relationship).

4. *See, e.g.*, N. Lee Cooper, *Religion and the Lawyer*, 66 FORDHAM L. REV. 1083, 1085 (1998) ("Even if our own practices are geared toward FERC regulation or corporate finance, whose benefits may appear abstract to the individual, there is always a wealth of *pro bono* opportunities available."). *See also* Nitza Milagros Escalera, *A Christian Lawyer's Mandate to Provide Pro Bono Publico Service*, 66 FORDHAM L. REV. 1393, 1393 (1998) ("Nowhere is the lawyer's religious obligation more evident than in the area of *pro bono publico* service."). *See generally* THE LAW FIRM AND THE PUBLIC GOOD (Robert A. Katzman ed., 1995) (discussing the role of large law firms in addressing the needs of those who cannot afford legal services).

5. *See, e.g.*, James M. Jenkins, *What Does Religion Have to Do With Legal Ethics? A Response to Professor Allegretti*, 66 FORDHAM L. REV. 1167, 1168 (in mid-sized to large firms, "[c]hanging what is perhaps only legal piecework that is totally impersonal into a covenant relationship may simply be impossible").

6. *See, e.g.*, Azizah al-Hibri, *On Being a Muslim Corporate Lawyer*, 27 TEX. TECH. L. REV. 947, 951 (1996) (describing exit from large firm practice after concluding "the world of law firms had something fundamentally wrong with it"); William Bentley Ball, *On Hoping to Be, Being, and Having Been*, 27 TEX. TECH. L. REV. 1005, 1005 (1996) (describing transition from corporate work to cases involving protection of religious freedom, out of a "deep need" to "serve better causes"). *See also* Jenkins, *supra* note 5, at 1167 (noting distinct nature and difficulties of large firm corporate practice); ANTHONY T. KRONMAN, THE LOST LAWYER 378 (1993) (If a practitioner "takes the ideal of the lawyer-statesman seriously . . . the first thing he should do is stay clear of [large-firm practice].").

as "personal" or "religious" can be integrated into the practice of law at a large firm.[7] Part I describes some of the aspects of big firm practice that make it particularly difficult to integrate religious and personal values which may give meaning to one's work. Part II suggests that such meaning can be found through a religious vision of what it means to be a person, which includes a sense of obligation to serve the common good. Part III explores how this concept might interface with the ideals, duties and culture of the legal profession. Part IV extends this analysis to the context of a practice that serves big business. Finally, Part V ponders how such a notion may be applied in the specific context of big firm litigation practice. I conclude with hope that the profession will make room for the substantive contribution that lawyers with a religious vision of the human person and of the common good can bring to the public discourse and the practice of law, even in the context of big firm practice.

I. The Particular Difficulties of Big Firm Practice

In the effort to integrate personal and religious values into one's day to day legal work, what is particularly difficult about the context of large firms which service primarily business and commercial interests? Alasdair MacIntyre explains, "Any contemporary attempt to envisage each human life as a whole, as a unity" will encounter "two different kinds of obstacles, one social and the other philosophical."[8] "The social obstacles derive from the way in which modernity partitions each human life into a variety of segments, each with its own norms and modes of behavior. So work is divided from leisure, private life from public, the corporate from the personal."[9]

In large and diverse corporate environments, work life is ordered according to a certain "public square" cultural etiquette. The Establishment Clause "wall of separation" metaphor is applied

7. This focus is certainly not to discourage anyone from setting aside time for *pro bono* work. In fact, for many associates at large firms, a firm's encouragement and realistic accommodation of *pro bono* work is at the top of the list of criteria for deciding where to go. Some firms do a better job than others. A tip for students who would like a "reality check" about a firm's attitude towards *pro bono* time allowed: in counting hours for the purpose of minimum requirements or bonuses, ask whether time spent on *pro bono* projects is lumped together with the billable hours. If not, a policy of "encouraging *pro bono*" may in reality translate into whatever you can fit in between one and two in the morning.

8. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 204 (2d ed. 1984).

9. *Id.* at 204.

as a cultural guide: religion is placed in the "private" — read "not work" — sphere. As the Supreme Court proclaimed in *Lemon v. Kurtzman*, "The Constitution decrees that religion must be a private matter for the individual, the family, and institutions of private choice."[10]

"Lawyers for people"[11] seem to have more room than corporate lawyers to envision their work as a unity with their personal beliefs. An individual attorney-client relationship is arguably an "institution of private choice," in the sense that the client and the attorney can agree to give to the relationship the shape and meaning they wish. If they would like to permeate it with religious values, or any other kind of values, they are certainly free to do that, so long as the relationship is lawful and within the standards of professional ethics. In contrast, because big firms which service big business have more of a "public square" feel, we are not sure it is appropriate, or even permissible, to apply to our work in the market square values that are often framed as matters of personal belief or private morality. There could be "something troubling or even wicked"[12] about the injection of personal and religious values into this context.[13]

According to MacIntyre, the philosophical obstacles derive from two tendencies. The first is the tendency to think atomistically about human action and to analyze complex projects and transac-

10. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

11. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS 63 (1994) ("Why do corporate lawyers and lawyers for 'people' move past each other in the legal system like bishops of different colors on a chessboard?").

12. *See* Stephen L. Carter, *Introduction to Faith and Law Symposium*, 27 TEX. TECH. L. REV. 925, 926 (1996) (arguing against the vision that "[p]art of the trouble with moral lawyering today is the weird steady drumbeat, in some parts of our politics and most parts of our law, that there is something troubling or even wicked about the explicit (or maybe even implicit) import of religious values into the public square, the place where we hold our public policy debates").

13. I realize I run the risk of idealizing and oversimplifying the individual attorney-client relationship, particularly because I have little direct exposure to it. Undoubtedly "lawyers for people" and corporate lawyers face many similar concerns. *See generally* THE LAWYER'S CALLING, *supra* note 3 (discussing challenges applicable to both lawyers for individuals and lawyers for large corporations). For example, individual clients can use their lawyers as a means to an end, just like corporate clients. And certain corporate lawyers with a certain level of power can and do create "moral communities" with their corporate clients. Here, however, I would like to focus on the structural point: the face-to-face and more personal nature of the individual attorney-client relationship lends itself more easily to the integration of personal and religious values than the big firm-big business relationship.

tions in terms of simple components. The second is the tendency to separate the individual from the roles that he or she plays.[14]

The first is particularly prevalent in big firm practice. Because of the specialized nature of the services large firms provide to large businesses and the hierarchical structure of large firms, complex actions and transactions tend to be broken into tiny pieces. In the corporate context, it is not rare for individual lawyers to feel not that they are engaged in a relationship with the client, but rather are performing impersonal micro-specialized piecework.[15] This tends to make the legal work quite anonymous. The sophisticated business client, often a lawyer, is probably more interested in buying a means to an end than in forming a "moral community" or discussing the overall social impact of business decisions.

The second philosophical obstacle, the tendency to separate the person from the role that he or she plays, is not particular to big firm practice. But in the corporate world, the heightened sense that there is "something troubling" about bringing religious and personal values to bear on one's work can make the search for alternatives more difficult.[16] According to prevailing interpretations of the norms governing our adversarial system, a lawyer's role is to act "with zeal in advocacy upon the client's behalf."[17] As Deborah Rhode described, "[t]he assumption underpinning bar ethical codes is that the most effective way to discover the truth and preserve rights is through an adversarial process in which lawyers have 'undivided fidelity to each client's interests as the client perceives them.'"[18] The assumption also is expressed in the

14. MACINTYRE, *supra* note 8, at 204.

15. *See* Jenkins, *supra* note 5, at 1168 ("In my experience, a client is not likely to hire a lawyer to be sympathetic or understanding or to become a friend or a supporter in a covenant relationship, although the client may want all these things and may even get them. What he really seeks is a lawyer well versed in his area of need who will correctly analyze the matter and give competent and totally objective advice — without being influenced by the personal relationship. The client is more likely to want a correct opinion than a caring one.").

16. *Cf.* THE LAWYER'S CALLING, *supra* note 3, at 94 (discussing creative alternative dispute resolutions, including Christian conciliation centers in which Christians can being their disputes in order to obtain non legal remedies).

17. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt.[1] (1998) [hereinafter MODEL RULES].

18. Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 312 (1998) [hereinafter Rhode, *Professionalism Problem*] (quoting American Lawyer's Code of Conduct Ch. II cmt (Roscoe Pound-American Trial Lawyers foundation 1982), *reprinted in* STEVEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 323, 335 (1989)).

wide-spread and powerful metaphor of the lawyer as the "hired gun."[19]

One celebrated definition of the advocate's role emerged from the 1820 trial in which King George IV sought to divorce his wife Queen Caroline. Her attorney, Lord Brougham, threatened to defend her by proving the King's own adultery and secret marriage to a Catholic, which would have required the King to abdicate the throne. In response to criticism that good citizenship required him to refrain from making such an argument, Lord Brougham responded:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty. In performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[20]

Gerald Uelmen described the model of undivided fidelity as particularly compelling in the criminal defense context.

> A lawyer can, and probably should, advise a client that a particular position or argument may hurt the best interests of the country. The choice of whether to forgo the advantage, however, must be left to the client. In a criminal case, where the life or liberty of the client is at stake, it will be a rather unusual client who will say, "I'd rather go to jail — or be gassed or electrocuted — than imperil the interests of my country."[21]

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19. *See* THE LAWYER'S CALLING, *supra* note 3, at 65 (The "standard" vision of the lawyer's role includes partisanship: "the lawyer is a partisan who owes his undivided allegiance to his client and who does whatever it takes to achieve his client's goals.").

20. Gerald F. Uelmen, *Lord Brougham's Bromide: Good Lawyers as Bad Citizens*, 30 LOYOLA L.A. L. REV. 119, 119-20 (1996) (quoting DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 189 (1973) (quoting 2 Trial of Queen Caroline 8 (London, J. Robins & Co. Albion Press 1820-21)). For a critique of the "Uelmen-Brougham" model which Gerald Uelmen described as watching himself being sliced up and served for dinner, but with such elegant presentation that he did not mind, see Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291 (1998); Letter from G. Uelmen to Alschuler (on file with the author). *See also* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 2 GEO. J. LEGAL ETHICS 241, 257-58 (1992) (discussing George Sharswood's 1854 essay on legal ethics, which rejected the Brougham model of advocacy).

21. G. Uelmen, *supra* note 20, at 122; *see also* Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 988

While the Brougham model may have particular weight in the criminal context, it does not necessarily follow that in all contexts lawyers should be "reckless of consequences." Yet there are many indications that in business counseling and civil litigation the concept of "knowing but one person" is often swallowed whole.[22]

Deborah Rhode described the "considerable personal price" a lawyer's refuge in role can extract:

> When professional action becomes detached from ordinary moral experience, lawyers' sensitivity can atrophy or narrow to fit the constructed universe dictated by role. The agnosticism that advocacy purportedly entails can readily become a defining feature of one's total personality. Such a perspective offers the illusion of freedom from responsibility, while in fact delimiting individuals' moral autonomy. At best, the result is likely to be a resigned submission. At worst, it can foster an enervating cynicism. Success is gauged by victories, not values, and professional idealism is dismissed as pompous rhetoric.[23]

Chillingly bleak. My personal values and beliefs have nothing to do with my work as a lawyer and there seems to be so little room to think about the big picture of how my work fits in with society as a whole. I bury myself in the minute task at hand, and put blinders on to the larger impact of my work. As time passes, I become more and more fragmented within, and convinced that I am an ambivalent cog in the great machine that keeps Corporate America running, for better or worse.[24] No wonder recent reflections describe lawyers as lost[25] and the legal profession as betrayed.[26]

What have we lost? How have we been betrayed? Whom do we betray? I submit it is not simply the sense of what it means to be a

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(1995) (suggesting that partisan model of advocacy may be more justified in criminal defense context).

22. *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice* (Symposium on the Corporate Law Firm), 37 STAN. L. REV. 589, 605-08 (1985) [hereinafter Rhode, *Ethical Perspectives*]. *See also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 64 (1988) (noting faulty application of criminal paradigm to civil context; "wealthy civil litigants may enjoy precisely the same advantages as the state in most criminal proceedings: enormous resources for the investigation and hiring of expertise, imbalances in bargaining strengths; and legal counsel that is relatively unconstrained by budgetary limits").

23. Rhode, *Ethical Perspectives*, *supra* note 22, at 626.

24. For some the ambivalence may be closer to the surface than for others. But I am convinced that even those who seem to have whole-heartedly taken on the role often harbor deep doubts within.

25. *See* KRONMAN, *supra* note 6.

26. *See* SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994).

lawyer. We lose, we betray, the sense of what it means to be a person. How can we find it again?

II. On Being a Person

Big firm practice reflects some of the most profound difficulties in the search for meaning: human life is partitioned into segments, human action is atomized into components and the essence of the human being is severed from the role that he or she plays. In light of these difficulties, how can we arrive at a more complete understanding of what it means to be a person, a vision of human life as a whole, as a unity?

Aristotle put together many of the pieces in his fundamental insight into the social nature of the human being — "Since 'man is by nature a political [or social] animal' who cannot be self sufficient (fully realized) as a human being in isolation from others, but rather can achieve such self-sufficiency only in a voluntary community of friends, 'the chief end, both of individuals and states,' is the attainment of the common good of the citizens of the state through the creation and maintenance of such a community."[27]

Virtue ethics focuses, at least initially, on the nature of the person rather than the person's acts. It asks what sort of person one ought to be, what sort of life one ought to live, and not, at least in the first instance, what acts one ought to do.[28] The essence of my nature as a person is to work to create and maintain the community. My "chief end" is to work for the common good. Volumes, entire libraries, have been written on what is the common good, how it can be attained, whether it can be attained and whether it can even be defined.[29]

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27. Richard Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 684-85 (1992) (citing ARISTOTLE, POLITICS I.2 at 1252b28-1253a18; III.6 at 1278b15-25; NICOMACHEAN ETHICS, 1.7 at 1097b8-11; VIII.9 at 1159b25-1160a14; IX.9 at 1169b3-21 (B. Jowett trans.) *in* 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., Revised Oxford Translation, Princeton Univ. Press 1984)).

28. *See* Ruth Anna Putnam, *Reciprocity and Virtue Ethics,* 98 ETHICS 379 (1988). *See also* Timothy W. Floyd, *The Practice of Law as a Vocation or Calling*, 66 FORDHAM L. REV. 1405, 1413 (1998) (listing ramifications of Aristotelian perspective; "ethics is about what kind of life we will live").

29. *See, e.g.,* PHILIP SLEZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 524-38 (1992) (discussing philosophical and social theories which resist the idea of the common good); MACINTYRE, *supra* note 8, at 232 ("In a society where there is no longer a shared conception of the community's good as specified by the good for man, there can no longer either be any very substantial concept of what it is to contribute more or less to the achievement of that good.").

Without a religious point of reference, one can, as did Aristotle, arrive at and articulate a definition of the person as being in relationship with the community, and to have as one's chief end the common good.[30] But it is undoubtedly difficult to maintain such a vision, and even more difficult to act accordingly in daily life. As human beings, we tend to turn in on ourselves, to be taken by greed and enchanted by power. At the very least, we are often unable to rise above the narrow interests and affections directly before us, unable to discern the "crucial distinction between what any particular individual at any particular time takes to be good for him and what is really good for him as a man."[31]

Religious reflection and experience have provided not only rich insights into the nature of the human person, the community, and the definition of the common good,[32] but also a guide to understanding the implications of the vision in daily life, and a source of strength to live accordingly. For purposes of discussion, it might be useful to define religion. The Latin root of the word religion means "to tie back," or "to bind together again."[33] Religious tradition and experience "bind together again"' — the person with God, the person within, in an inner unity and integrity, and the person with others, with the community. Acts of worship and conduct in accordance with a set of norms or commands are not the heart of religion, but rather expressions of these relationships — expressions of how the person, God and the community are bound together.[34]

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30. Aristotle's definition of the human person serves as the basis of some discussions of lawyering that do not include an explicitly religious point of reference. *See, e.g.*, KRONMAN *supra* note 6, at 31-2 (describing the new republicans rejection of the assumption that political action is essentially private in nature: "the point of political action is not always to obtain something the actors antecedently want — to satisfy a pre-political desire — but sometimes to determine instead what it is they ought to want, to decide what their interests shall be, and not merely to pursue the ones they already have"); Luban *supra* note 22, at 126-27 (describing the moral limit to a lawyer's partisan zeal based in responsibility to a vulnerable non-client, to whom the lawyer is related by the fact of common humanity).

31. MACINTYRE, *supra* note 8, at 150.

32. In discussing definitions of the person and the common good, I will refer to the texts and traditions of the Roman Catholic Church because I am a Catholic and because these are the texts and traditions with which I am most familiar.

33. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1918 (3d ed. 1986).

34. *See* Joseph Boyle, *Duties to Others in Roman Catholic Thought, in* DUTIES TO OTHERS 73, 84 (Courtney S. Campbell & B. Andrew Lustig eds., 1994) ("[M]oral norms are not, on the Catholic conception, arbitrary impositions by God. They are not tests set up to make life difficult, but the demands of our own rational natures. According to natural law theory, morality is a participation by rational creatures in God's providence so that they may guide their lives to what is genuinely good. Thus,

Gaudium et Spes, the Second Vatican Council's Pastoral Constitution on the Church and the Modern World, describes the "interdependence between personal betterment and the improvement of society."[35]

> Insofar as man by his very nature stands completely in need of life in society, he is and he ought to be the beginning, the subject and the object of every social organization. Life in society is not something accessory to man himself: through his dealings with others, through mutual service, and through fraternal dialogue, man develops all his talents and becomes able to rise to his destiny.[36]

Thus, relationships with other people are not simply a reality the person needs in order to function. These relationships are intrinsic to the definition of the person. It is only in relationship with other people that the person is fulfilled. To illustrate, the "person" can be defined in contrast to the "individual." An "individual" needs only himself, and sees the other only as an external functional aid. In the "person," on the other hand, "the other opens one's individuality, bringing one beyond one's self, in order to complete one's self."[37] To have others as a point of reference is not an obstacle to fulfillment, but rather a possibility — the chance to escape from the narrow dimension of the self, from a vicious circle of individualism, to enter into the richer dimension of community.[38]

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the reason which provides the basis for moral norms is a person's own reason, not something alien or imposed." (citing ST. THOMAS AQUINAS, SUMMA THEOLOGICA Question 91, Answer 2)).

35. *Gaudium et Spes, Pastoral Constitution on the Church and the Modern World in* VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS n.25 (Austin Flannery, O.P., ed. 1975) (citing ST. THOMAS AQUINAS, ETHICS, Lect. 1). The documents from the Second Vatican Council, which convened in four sessions from 1962 to 1965, reflect the Catholic Church's *aggiornamento* (updating) regarding various aspects of its internal life and its role in modern society. The title *Gaudium et Spes*, "the joy and hope," is from the first words of the document: "The joy and hope, the grief and anguish of the men of our time, especially those who are poor or afflicted in any way, are the joy and hope, the grief and anguish of the followers of Christ as well." *Id.* at n.1.

36. *Id.* at n.25.

37. Luigino Bruni, *Relazionalità e Scienza Economica* [Relationality and Economic Science], ("Bruni"), 19 NUOVA UMANITÀ 437, 440, nn.3-4 (1997) (quoting the Italian philosopher Giusseppe Zanghi) (throughout this essay, the translations from the original Italian are my own). *See also id.* at 451 ("to amputate from the human being his relational component means to put at the basis of economic science a caricature, something which is profoundly different from what the human being is"). *Nuova Umanità* [New Humanity] is an interdisciplinary journal of culture published in Italy.

38. *See* Mario Gecchele, *L "altro" indispensabile* [The Indispensible Other], 18 NUOVA UMANITÀ 577, 581, n.18 (1996) (discussing ideas of the French philosopher

After defining the person as the focal point of every social organization, *Gaudium et Spes* defines the "common good" as "the sum total of social conditions that allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily."[39] The consequent obligation is that "[e]very group must take into account the needs and legitimate aspirations of every other group, and still more of the human family as a whole."[40] As such, the common good is that which a person reaches only if it includes as a consequence, the good of the others.[41]

Religious reflection brings me to a sense of obligation — not because of an external command, but rather out of an internal conviction about the essence of my nature as a person and the consequent relationships with God and with others. Listening to God within, I understand who I am as a person and feel the desire to correspond to that reality in my daily life. It is not a burden, but a joyous and grateful response in the context of a relationship. Based on religious reflection, I arrive at the conclusion that if I would like to be a person, to be fully human, I *must* keep before me a vision of the common good, I *must* live according to the implications of this vision in every aspect of my life.[42]

Let's be clear about the stakes: asking me not to act in accord with this sense of obligation, not to take it into consideration in every aspect of my daily life, is to ask me to let go of my deepest sense of what it means to be a person.

Mounier). *See also id.* at 582-85 (discussing reflections of Martin Buber); MACINTYRE, *supra* note 8.

39. *Gaudium et Spes*, *supra* note 35, at 9. *See* CATECHISM OF THE CATHOLIC CHURCH 517 (1995) ("In keeping with the social nature of man, the good of each individual is necessarily related to the common good, which in turn can be defined only in reference to the human person.").

40. *Gaudium et Spes*, *supra* note 35, at 9. *See* CATECHISM OF THE CATHOLIC CHURCH 518 ("[T]he common good presupposes *respect for the person* as such . . . the *social well-being* and *development* of the group itself . . . and the stability and security of a just order.").

41. *See* Antonio Maria Baggio, *Trinità e Politica. Riflessione su alcune categorie politiche alla luce della rivelazione trinitaria* [Trinity and Politics: Reflections on a Few Political Categories in the Light of Trinitarian Revelation], 19 NUOVA UMANITÀ 727, 788 (1997).

42. *See* Thomas L. Shaffer, *Maybe a Lawyer Can be A Servant; If Not . . .*, 27 TEX. TECH L. REV. 1345, 1345 (1996) (describing the nature of a religious heritage as "an awesome, demanding, put-it-absolutely-first set of habits, propositions, and pressures. It is not something to be reconciled with something else, not something that informs some other thing that is in need of being informed. It is, rather, dissonance with faith that must be reconciled with faith. Whatever is not consistent with faith must be conformed, not informed.").

III. On Being a Person Who is a Lawyer

Logically, I would bring this sense of obligation to my work as a lawyer. As a person who is a lawyer, my work *must* be an expression of the fact that my "chief end" is to work to maintain the community, to attain the common good.[43] If this *must* is understood in all its uncompromising strength, is there any room for me in the profession? Particularly, if the source of this *must* is grounded in religious reflection, is there "something troubling or even wicked"[44] about bringing it to bear on my daily work as lawyer?

A. A Religious Lawyer's Substantive Contribution to the Profession

As a preliminary matter, it is useful to consider to what extent professional traditions and current ethical standards address whether in advising clients and making decisions a lawyer *must* include broader considerations of morality and the common good. If this concept is already included in professional norms, we can at least entertain the notion that a religiously grounded sense of this obligation would be a "merely contingent" aspect of the self which can be "bleached out" of professional life with no great loss.[45]

The concept that a lawyer is to work for the public good is not foreign to the ideals of the profession.[46] It is prominent in Anthony Kronman's description of the "classical nineteenth century form" of the "lawyer-statesman": "The outstanding lawyer, as this ideal present him, is to begin with, a devoted citizen. He cares about the public good and is prepared to sacrifice his own well being for it, unlike those who use the law merely to advance their private ends."[47] As former federal judge Simon Rifkind described:

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43. Concern for the common good is only one aspect of the contribution that a religious person can bring to a workplace. For an insightful discussion of other aspects, see Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469, 1473 (1998) (discussing religious qualities in terms of obligation, integration, and transcendence). In this Essay I concentrate on the common good for the purpose of focus.

44. Carter, *supra* note 12, at 926.

45. *See* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1993) (describing the "professional project" as "the 'bleaching out' of merely contingent aspects of the self, including the residue or particularistic socialization that we refer to as our 'conscience'").

46. *See* Rhode, *Ethical Perspectives*, *supra* note 22, at 592-93 ("[L]iterature has long hosted laments for some happier era when law was a profession, not a business, and lawyers were stewards of societal values, not servants of private profit.").

47. KRONMAN, *supra* note 6, at 14; *see also id.* at 35 (describing the lawyer-statesman as a public-spirited participant in deliberative debates concerning the meaning of

"The advocate has more than a private fiduciary relationship with a client; he also has a public trust .... In his counseling and planning functions, the attorney not only expedites his client's wishes and lightens the work load of the courts; he enforces the law as well."[48] While some have questioned whether in reality the ideal ever existed, and if it did, whether the reality was so ideal,[49] one need not search long to find descriptions of lawyers as servants of the public good.

On the other hand, the codes of professional ethics contain very limited references to when a lawyer must place concern for the community over an individual client's requests and goals. In the Model Rule for the scope of representation, the only explicit "shall not" is that "[a] lawyer shall not counsel a client to engage, or assist a client in conduct the lawyer knows is criminal or fraudulent."[50] To the extent that a religious lawyer brings to the profession a sense of obligation to the common good that extends beyond avoiding participation in criminal activity and fraud, this is a value not already contained within the professional code.[51] Thus this value could not be described as a "merely contingent" aspect of the self which can be "bleached out" of the profession with no great loss.

The *may* is on the books. The Preamble to the *Model Rules* reads: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[52] Specifically, Model Rule 2.1 provides: "In

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the common good); *id.* at 36 (at the core of the federalist-republican culture is "the simple but potent idea that lawyers have an obligation to serve the public good — consciously to promote not only their clients private interests but also the integrity of the rules and institutions which form the framework within which these interests exist"); Robert Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 258 (1990) ("The ideal of law as a public profession ... supposes that lawyers will develop some vision of the common good or public interest, and try to realize it in their practices, if necessary against the immediate wishes of their clients.").

48. LINOWITZ, *supra* note 26, at 3-4 (quoting SIMON H. RIFKIND, ONE MAN'S WORD 502-03 (New York, privately printed 1986)).

49. *See, e.g.*, Rhode, *Professionalism Problem*, *supra* note 18, at 304 (questioning whether the ideal ever existed: "virtually every era that modern commentators applaud attracted its own share of critics with concerns often paralleling those of today"); LINOWITZ, *supra* note 26, at 5-9 (noting imperfections of mid-century legal practice, including exclusion of those who were not white Anglo-Saxon Protestants).

50. MODEL RULES Rule 1.2(d).

51. *See* Gordon, *supra* note 47, at 278 ("The disciplinary codes give almost no support to the compliance counselor's role."); Rhode, *Ethical Perspectives, supra* note 22, at 625 (stating that if individual or corporate clients ignore ethical advice, the bar acknowledges no responsibility to withhold further assistance).

52. MODEL RULES Preamble: A Lawyer's Responsibilities [1] (1998).

rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[53] The comment to Model Rule 2.1 notes, "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."[54]

But in the context of duties that are more emphasized in practice, the space for bringing to bear ethical and moral considerations seems quite limited. Interfacing concern for the common good with the duty to act with zeal on a client's behalf[55] and the duty of loyalty,[56] the question arises whether a lawyer whose vision of the common good clashes with the client's vision of its own objectives would not have a conflict of interest.[57] Particularly if a lawyer's vision of the common good is grounded in religious reflection, it could be considered a "personal social viewpoint" which should not be allowed to "dilute" the zeal with which he represents a particular client's interest. An annotation to Rule 1.2 warns: "A lawyer may not allow personal interests and loyalties, including political or social viewpoints, to dilute the diligence or vigor with which a client is represented."[58]

According to the rules of professional responsibility, a lawyer "may" bring in considerations of ethics and morals, but in practice, references to the common good, if not legally required, are not common. As Deborah Rhode observed, the premise underlying most commentary and interpretation of codes of professional ethics is an assumption for "a societal preference for individual over collective interests."[59] For example, the American Trial Lawyers

53. *Id.* Rule 2.1.

54. *Id.* Rule 2.1 cmt. 2. *Accord* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 [hereinafter MODEL CODE] ("Advice of a lawyer to his client need not be confined to purely legal considerations. . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors [that] may lead to a decision that is morally just as well as legally permissible."). *See also* Geoffrey C. Hazard, *Doing the Right Thing*, 70 WASH. U. L. Q. 691, 695 (1992) ("With regard to interjection of personal, moral and prudential values, under the governing rules of professional ethics the lawyer has the authority and at times the duty to be assertive.").

55. MODEL RULES Rule 1.3 cmt. 1; *see also* MODEL CODE Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

56. *See, e.g.*, MODEL RULES Rule 1.7 cmt. 1 ("Loyalty is an essential element in the lawyer's relationship to a client.").

57. *See, e.g., id.* Rule 1.7(b) ("A lawyer shall not represent a client if the representation of the client may be materially limited by . . . the lawyer's own interests.").

58. *See* Bruce A. Green, *The Role of Personal Values in Professional Decision Making*, 11 GEO. J. LEGAL ETHICS 19, 38 n.77 (1997) (citing MODEL RULES OF PROFESSIONAL CONDUCT ANNOTATED, Rule 1.2 commentary at 22 (1996)).

59. Rhode, *Ethical Perspectives*, *supra* note 22, at 605.

Code of Conduct provides: "In a society such as ours, which places the highest value on the dignity and autonomy of the individual, lawyers serve the public interest by undivided fidelity to each client's interests as the client perceives them."[60] Some are concerned that an attempt to incorporate duties to the common good into codes of professional responsibility would be a move toward "totalitarianism." "[A]ny effort to place the 'interests of society over the interests of the individual . . . [represents] a very significant move toward totalitarianism. It makes the lawyer the agent of the state."[61]

This is a place where a religious lawyer could bring an important contribution to the practice of law. Substantively, it consists in this: a *must* that highlights the *may*. Moved by the sense that I *must* bring concern for the common good to bear on my legal work, I search out and highlight the practical opportunities in which I *may* incorporate ethical and moral considerations. Thus, the *may* which is on the books but buried in practice shines out in its full potential to critique unrestrained individualism and recapture the lawyer's duty to serve the public good. Because the source of this *must* is grounded in religious reflection and personal obligation rather than a duty imposed by the state, the "move toward totalitarianism" is not a concern.[62] Arguably such an effort would embody the highest ideals of the profession. But it would also raise some eyebrows, particularly if grounded in and motivated by religious reflection. Why?

B. Cultural Barriers

Behind the raised eyebrows would be a cultural analysis that goes something like this: we live in a pluralistic society in which a "wall of separation" functions as a powerful cultural metaphor. It delineates "a permanent separation of the spheres of religious activity and civil authority."[63] "The Constitution decrees that reli-

60. *Id.* (quoting ROSCOE POUND AMERICAN TRIAL LAWYERS FOUNDATION [ATLA] CODE OF CONDUCT comment, at 202 (1981)).

61. *Id.* at 607 (citing Monroe Freedman's explanation of objections to the Kutak draft).

62. It would be interesting to explore whether some concern for the common good could and/or should be included in codes of professional responsibility as a professional obligation. This discussion is beyond the scope of this Essay.

63. Everson v. Board of Educ., 330 U.S. 1, 31-2 (1947) (Rutledge, J., dissenting). The dissent's reasoning is noted because it has been quite influential in subsequent Establishment Clause analysis.

gion must be a private matter for the individual, the family, and institutions of private choice."[64]

True, the wall metaphor refers to an interpretation of the Establishment Clause,[65] which limits state action, not private activity. This constraint on government does not *per se* apply to the internal life of most private workplaces, including most large corporations and large law firms. Nonetheless, there is something attractive about the wall that has led to its application as a cultural guide for many aspects of our life in the "public square" of the workplace. Particularly in large and diverse workplaces, it just seems prudent and perhaps easier to try as much as possible to bracket discussions about religious beliefs and how they might apply in the workplace because we would like to avoid treading into potentially divisive territory.

Thus cultural etiquette advises us to keep religion in the private — *i.e.* "not work" — sphere. Personal moral visions of our life as a community — particularly those grounded in religious belief — should be, at most, discussed only with those who explicitly consent to such conversations. Otherwise, there is the very real danger that people in power, including lawyers, will "impose" their personal moral or religious views on others.[66]

The criterion for deciding what kind of values can be brought into the public square is "whether they are shared by others." For lawyers, the best indication of whether values are "shared" enough is whether these values are already included in codes of professional responsibility. Those values that are "contingent, or not shared by others" should be, in Sanford Levinson's terms, "bleached out" of professional life.[67] Bluntly, I should keep my *must* to myself. I can agonize over it privately, but it is inappropri-

64. *Lemon,* 403 U.S. at 625.

65. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.").

66. *See, e.g.*, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH 279 (1991) ("[T]hough you may ultimately provide a client who asks for it with your opinion, you should do so only after you have counseled a client thoroughly enough that you can base your opinion on the client's subjective values, not on your own.").

67. *See* Levinson, *supra* note 45, at 1578 (Professional norms require "the 'bleaching out' of merely contingent aspects of the self, including the residue or particularistic socialization that we refer to as our 'conscience.'"); *see also* Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975, 983 (1990) ("Those who are willing to acknowledge that their values are contingent, or not shared by others who may in fact have it right, may well be able to adjust to professional norms.").

ate for me to bring it to bear on my work in a law firm with business clients.[68]

Hypothetical examples of how lawyers attempt to bring their religious beliefs to bear on their work illustrate where such an analysis makes sense. For example, Bruce Green portrays Upright, a legal ethics expert, who is consulted about whether to disclose to the authorities a partner's fraudulent billing practices. Unknown to the client, Upright "possesses a personal moral and religious view that it is improper to 'snitch' on friends, family, colleagues, and others with whom one has a relationship."[69] There does seem to be "something troubling or even wicked" about Upright bringing this religious view to bear in his legal counseling, particularly since such belief is unknown to the client, and because the client may not share this view.

One reaches similar results upon considering Green's analysis of the family law practice of Faith, a lawyer who holds, among other views, "that the religious principle that children should honor their parents means that children of divorced parents should spend time with the non-custodial parent whether they like it or not."[70] It would be troubling to impose such a precise maxim on an unsuspecting client. As Justice Cardozo observed, a judge who believed theater going was a sin "would err if he attempted to impose upon the community as a rule of life his own idiosyncrasies . . . . My own notion is that he would be under a duty to conform to the accepted standards of the community, the morés of the times."[71]

Richard Matasar described "the pain of moral lawyering" when a lawyer's personal moral code conflicts with the client's goals. When faced with the awful conflict between ignoring the client's needs, or the lawyer's own need to salve his conscience, Matasar concludes that the lawyer should concede to the wisdom of the pro-

68. *See* Matasar, *supra* note 67, at 981 ("Do what the profession demands. That is the price of being a lawyer, and that is the end of the story."). For descriptions of, but not support for, this view, *see, e.g.*, Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 438 (1985) (discussing notion that the possibility of a broader influential and independent counselor role in large law firms is "not a proper normative ideal, either because what is 'right' is too ambiguous, or because the lawyer has no expertise in or responsibility for business judgments"); Rhode, *Ethical Perspectives*, *supra* note 22, at 621 (discussing the notion "[b]y what right should lawyers 'play God' or 'impose their own views about the path of virtue upon their clients'").

69. Green, *supra* note 58, at 49.

70. *Id.* at 36.

71. *Id.* at 33-4.

fession. "Do what the profession demands. That is the price of being a lawyer and that is the end of the story."[72]

> Unless individuals are 'true believers,' they probably carry doubts about many values that conflict with those of the profession. Those who are willing to acknowledge that their values are contingent, or are not shared by others who in fact might have it right, may well be able to adjust to professional norms . . . . Those who maintain deep humility about their values may be best able to cope with gaps between personal values and professional demands.[73]

I would like to discuss three aspects of this analysis and challenge a few of the underlying premises. First, the extent to which it relies on an interpretation of the Establishment Clause as cultural guide for "walling off" religion from public life. Second, the extent to which it relies on a perception of "religious lawyering" as an attempt to impose particular practices or maxims on others who do not share those particular beliefs. Third, the extent to which it presumes there is always a danger that the lawyer will "impose" her beliefs on the client.

1. *Madison's Advice: "Keep the Ministry Obliquely in View"*

One of the pillars supporting the analysis is the proposition that the "wall of separation"[74] erected by the Establishment Clause not only mandates the institutional separation of church and state, but also translates into a cultural guide, essentially "walling off" religion from public life. Thoughtful and thorough scholarship indicates that the historical support for this cultural application may be pretty slim.

Legal historian Mark DeWolfe Howe observed that more than a century before Thomas Jefferson used the "wall of separation" phrase, Roger Williams, champion of religious liberty and freedom of conscience, used the same metaphor, with an opposite effect. Williams imagined a "wall of separation" out of concern for "the dread of worldly corruptions which might consume the churches" if "a wall of separation did not stand between them and the state."[75] Howe surmised: "If the First Amendment codified a figure of

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72. Matasar, *supra* note 67, at 981.

73. *Id.* at 983.

74. Thomas Jefferson is commonly credited for coining the phrase. *See Letter of Thomas Jefferson to the Danbury Baptist Association* (visited March 15, 1999) <http://www.danbury.lib.ct.us/org/religion/letter/jeff.html>.

75. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 6 (1965).

speech it embraced the believing affirmations of Roger Williams and his heirs no less firmly than it did the questioning doubts of Thomas Jefferson and the Enlightenment."[76] Studying the texts that served as the basis for the development of the religion clauses, Daniel Dreisbach also concluded that the purpose of the wall was "to foster an environment in which religious freedom could flourish"; the wall was "only useful insofar as it advanced the end of religious freedom."[77]

The history of the founding is replete with examples of the extent to which the founders regarded religion and morality as "indispensable supports" to the public life of the newly born nation.[78] Particularly interesting are indications of the extent to which the founders, many of them lawyers themselves, kept religion as a point of reference in their own professional lives. James Madison, for example, advising his young friend William Bradford on his "choice of callings," expressed his disappointment that Bradford had decided not to go into the ministry. Madison advised him: "always keep the Ministry obliquely in View whatever your profession be. This will lead you to cultivate an acquaintance occasionally with the most sublime of all Sciences and will qualify you for a change of public character if you should hereafter desire it."[79] Bradford went on to become the first Attorney General of the United States.

These texts at least raise questions about the strength of historical support for an interpretation of the Establishment Clause as a

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76. *Id.* at 9.

77. Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations,* 69 N.C. L. REV. 159, 209-10 (1990).

78. *See, e.g.*, George Washington's Farewell Address (Sept. 17, 1796) (published in The Independent Chronicle, September 26, 1796) (last updated Feb. 27, 1998) <http://www.earlyamerica.com/earlyamerica/milestones/farewell/text.html> ("Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports . . . [a]nd let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle."); MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 154-66 (1984) (discussing the development of "public religion," the duty of which Benjamin Franklin viewed as to produce a common morality). This is not to argue that the Founders' concept of public religion best expresses or exhausts the contribution that religion can and should bring to public life. Rather it is to make the narrow point that for the Founders it would have been inconceivable to relegate religion to a completely distinct and private sphere.

79. JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 65-6 (1998).

cultural guide for "walling off" religion from public life. Particularly suspect are sweeping statements such as "[t]he Constitution decrees that religion must be a private matter . . . ."[80] As such, we should also question the extent to which interpretations of the Establishment Clause may support a cultural tendency to relegate religion to a "private" and out of the way sphere.

A legitimate question could be: "So what? The Founders could not have anticipated the kind of society in which we live today. We separate religion from the workplace because it is a good idea." The next section thus focuses on the substantive nature of religious lawyers' contributions to the public discourse and to the profession.

2. *A Suggested Focus for Religious Lawyering Discussions*

Discussions of religious lawyers' dilemmas are often framed in terms of a lawyer's attempt to bring to bear a very specific practice or maxim in counseling a client who does not share the lawyer's beliefs. There is "something troubling" about encouraging or allowing this. Working with Green's examples, take Upright's "personal moral and religious view that it is improper to 'snitch' on friends, family, colleagues and others with whom one has a relationship."[81] If "do not snitch on friends" is Upright's highest value in life, this could indeed bring him and his client into dangerous territory. It seems that Upright would have no moral qualms about facilitating organized crime. But to the extent that he does not have a certain hierarchy of moral principles, or a sense of complexity in their application to various circumstances, *e.g.*, "do not facilitate stealing" trumps "do not snitch on friends," Upright would be an unusual person, and should be analyzed as such.

Similarly, consider Faith's belief that "the religious principle that children should honor their parents means that children of divorced parents should spend time with the non-custodial parent whether they like it or not."[82] Of course there would be something troubling about the rigid application of such a maxim. Most responsible family law lawyers, including religious lawyers, would be concerned about any custody decision that does not consider all of the circumstances that might affect the physical and psychological well being of the children. To the extent that Faith does not ac-

80. *Lemon*, 403 U.S. at 625.

81. Green, *supra* note 58, at 49.

82. *Id.* at 36.

knowledge the need for such complex considerations, she would be unusual, and should be analyzed as such.

There is definitely something troubling about allowing anyone to rigidly impose "highly particular" and "far from universal" maxims on those who do not share those beliefs.[83] Indeed, the strongest case for making a recommendation based on values that the client does not share occurs when the lawyer's values coincide with professional values or common societal values.[84]

But there are several dangers to keeping discussions of religious lawyering focused on these kinds of examples. First, they could portray a caricature of religious lawyers as immature and insensitive, lacking a basic sense of moral complexity, and awkward and bumbling in the course of their interactions in a pluralistic society. Occasionally, religious lawyers are even portrayed as irrational and anti-social. As a reflection of society, the legal profession undoubtedly has its share of immature and irrational practitioners. But it is unfair to include these characteristics in the portrait of the typical religious lawyer.

A second danger is that these kinds of examples serve as a convenient but less than sturdy prop to a sweeping assertion: the normative value of the religious lawyer's contribution to public discourse should be measured by whether the values at issue are "shared by others." Where a belief is not "commonly held," a lawyer is required to conform to the morés of the times.

While this analysis may work for attempts to impose "highly particular" practices and maxims, it does not necessarily follow that whether a belief is "commonly held" should serve as the measure in all cases. There may be times when a client's goal is technically legal, but it collides with a lawyer's basic moral and religious vision of the common good: "taking rights seriously" versus "taking the community seriously." For example, a lawyer represents a retail clothing chain that is negotiating a contract with a foreign manufacturer that employs twelve-year-old children who are paid five cents an hour. The poverty in the area of the factory is extreme. May the lawyer bring to bear her visions of the common good in advising the client about the terms of the contract?[85]

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83. *See id.* at 40.

84. *See id.* at 45.

85. *See* F. Giba-Matthews, *A Catholic Lawyer and the Church's Social Teaching*, 66 FORDHAM L. REV. 1541, 1549 (1998) (analyzing this issue according to an application of Catholic social doctrine). This hypothetical is analyzed *infra* at p. 1230-31. Other examples where a client's goals may be technically legal but anti-social or immoral would include client's resistance of safety regulations. *See* Gordon, *supra* note

Particularly in the big business and large firm context, one could argue that there is a certain "shared belief" among clients and lawyers that considerations of the common good should not come into play. The prevailing interpretation of professional ethics advises that the common good be served by fidelity to the client's interests, as the *client* perceives them. Based on religiously grounded reflection, a lawyer may conclude that is not good enough. Here the lawyer should at least be allowed space to bring into the discussion ethical and moral considerations. It is precisely here where religious lawyers may bring to the practice a vision that provides a much-needed alternative to predominantly individualistic cultural tendencies.[86]

In some situations, there will be serious debates about whether a lawyer is bringing to bear an alternative all-embracing objective vision of the common good, or whether the lawyer is simply trying to impose on others a highly specific application of personal religious views. The abortion debate leaps to mind. Some aspects of divorce and other family matters may also fall into this category. Depending on the place a particular practice holds in an individual's scale of beliefs and values, there will be sticky issues about definitions of comprehensive visions and the conflict this may generate. For example, the cases in which Jehovah's Witness parents have

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47, at 264-65. Similar but probably easier issues also arise when a client counts on a regulatory agency's limited enforcement budget in deciding whether to comply with environmental, safety, or tax regulations. *See* Morgan & Tuttle, *supra* note 21, at 1024.

86. *See* Rhode, *Professionalism Problem*, *supra* note 18, at 321 ("Some conduct that is inconsistent with social interests remains legal either because prohibitions are too difficult or costly to enforce, or because policymakers lack sufficient information or independence from special interests. That clients have a legal right to pursue a certain objective does not mean that they have a moral right to do so, or that justice necessarily will be served by their zealous representation. Rather, one of a lawyer's most socially valued functions is to counsel clients about the full range of ethical considerations that bear on particular decisions and to withhold assistance in matters that run counter to the lawyer's own sense of social responsibility."); *see also* discussion *infra* at p. 1094-97; *Panel Discussion: Does Religious Faith Interfere with a Lawyer's Work?* 26 FORDHAM URB. L.J. 985 (Remarks of Stephen Carter: "[w]hen we think of the consumerism of our age, I think particularly about the pervasive ethic of our time, the ethic of 'I ought to be able to get what I want and you ought not to be able to stop me'. ... Lawyers are in the client service business, and so many lawyers conceptualize the role as 'my goal is to help the client get what the client wants.'"); WEEKEND EDITION-SUNDAY (Nat'l Public Radio Coverage, Jan. 10, 1999), *available in* 1999 WL 5731947 (Carter stated: "[A Christian lawyer cannot give fealty to such an idea]. . . if what my client wants is wrong in the eyes of my faith, it's quite unclear how I can justify helping my client go out and get it.").

refused to consent to their minor children receiving a life-saving blood transfusions are particularly difficult.

Such discussions are interesting and important because in many ways they reflect the tensions in the effort to define our culture. But we should be careful that they do not completely take over the conversation or become so contentious that they freeze the rest of the discussion about the common good. Most lawyers do not deal with these particular issues in their day to day practice; from a practical standpoint, these scenarios are marginal. We can, and we should, be talking about money, the environment, power, poverty, product safety, worker safety and government regulations; the list is endless. In each of these areas, religious visions of the common good express important ideals and applications; lawyers rooted in such visions have much to contribute to the public discourse. And we may be surprised to discover a vast common terrain that could serve as a basis for more productive discussions in the areas of currently intense conflict.

Shifting the focus of religious lawyering discussions away from analysis of the problem of rigidly imposing precise maxims on clients toward analysis of more common and more realistic dilemmas will be helpful in two ways. It will present a fairer and more realistic portrait of religious lawyers, and it will help to articulate the substantive contribution that religious lawyers can bring to the public discourse and to the practice of law.

3. *The "Client-Centered" Approach in Context*

A third premise of the cultural analysis is the presumption of a danger that the lawyer will "impose" her values on the client. "Client-centered" counseling contemplates that decisions should generally be left to clients.[87] A legal ethics textbook explains, "Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to provide a client with maximum satisfaction."[88] A lawyer should wait for an explicit invitation from the client before bringing moral nonlegal considerations to bear on the decision-making process, and the lawyer's opinion should be tailored to the client's subjective values: "though you may ultimately provide a client who asks for it

87. *See* BINDER ET AL., *supra* note 66, at 279 ("Client-centered counseling places maximum values on client decision-making.").

88. *See id.* at 261 (emphasis in text omitted) ("Our society highly values each individual's right of self-determination, and you ought to abandon that value only in the face of strong reason for doing so.").

with your opinion, you should do so only after you have counseled a client thoroughly enough that you can base your opinion on the client's subjective values, not on your own."[89] When a client makes a decision based on value preferences which conflict with the lawyer's, "unless a client's decision violates the law or is clearly immoral, principles of client autonomy suggest the client values prevail."[90]

This dynamic may be appropriate in the context of an individual attorney-client relationship where the lawyer is counseling an especially vulnerable client. The attorney must be sensitive to ways in which she may "dominate" the relationship to the detriment of open and effective communication and problem solving. However, problems arise when this theory is applied to the dynamics of large firm representation of big businesses.

First, in the relationship between a corporate client and its outside counsel, it may be the client who dominates the relationship or manipulates the lawyer.[91] Concerns about the lawyer "imposing" personal values may be out of context. In many instances, client domination is so pervasive that it is unrealistic to think that a lawyer, particularly an associate, could even speak to the client about such issues. In fact, the associate may not deal with the client at all. In these circumstances the balance of power is such that the discussion of personal or religious values should probably be framed as an analogue of "free exercise" or "freedom of expression" rather than a concern about the danger of "imposing" one's views on others.

Second, in the context of legal services to big business, it is questionable whether the ultimate criterion for decisions should always be "what choice is most likely to provide a client with maximum satisfaction,"[92] especially if the client measures "maximum satisfaction" as short-term gain. Stephen Ellman critiqued a client-centered approach to individual counseling that fails to bring to the forefront moral and political concerns: "[M]uch more is at stake in any case than one side's gain or loss. The acts that serve a client's self interest may take unfair advantage of other people or cause them more damage than they deserve to suffer. If the lawyer does not also ask the client about moral or political consequences, she

89. *Id.* at 279.

90. *Id.* at 282.

91. Allegretti, *supra* note 3, at 1112 ("[I]n the lawyer-client relationship, domination is not a one-way street.").

92. BINDER ET AL., *supra* note 66, at 261.

may implicitly exclude these effects on others from the counseling process."[93] In the context of legal representation of large businesses, given the proportion of power and resources concentrated in large corporate entities, the critique of counseling that fails to consider the impact of decisions on other people and on the larger community is even more compelling.

It goes without saying that not everyone would embrace wholeheartedly this vision of "being a person who is a lawyer." It could make people uncomfortable and it could even cost firms some money or some clients. However, there should be room for this vision because it is neither unprofessional nor at odds with the practice of law in a pluralistic culture. Lawyers with a vision of the common good grounded in religious reflection bring a specific and positive contribution to the life of the community, and to the profession as a whole. As Howard Lesnick explained, "A polity that encourages its citizens to bring to bear their own serious moral reflections on the morally significant decisions they face will be more likely to grow in justice and humanity."[94]

IV. On Being a Person Who is a Lawyer at a Big Firm

What does the "pain" of moral lawyering look like in big firm practice? It is premised on the perception that there is an irresolvable conflict between what the client wants and a lawyer's personal need to salve his or her conscience. If the lawyer follows his or her conscience, the client may be "harmed." Because there is no rationale for "imposing" personal beliefs on a client, the lawyer should do what the profession demands: serve the client's needs, as the client sees them.[95] Particularly when advising publicly traded corporations, this sense of irresolvable conflict is often linked to a

93. Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 748-49 (1987); *see also* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1125 (1988) ("The appeal to individual autonomy or right is not a sufficient basis for client loyalty because it begs the question of why the client's autonomy or right should be preferred to that of the person whose autonomy or right is frustrated by the client's activities.").

94. Lesnick, *supra* note 43, at 1489 ("Far from needing to be 'bleached out' by the norms of professionalism, a lawyer's desire to guide his or her actions by [common religious qualities] – should be presumptively welcomed as socially desirable characteristics, which enhance both the inherent quality and the likely consequences of interactions that lawyer's have with clients, third parties, and the legal system."); *see also* Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1267 ("A profession – especially a troubled one – should encourage discussion about comprehensive doctrines and their impact on the profession.").

95. *See* Matasar, *supra* note 67, at 981.

presumption that corporate activity is "amoral" — because a corporation's sole purpose is to make money, it is impermissible for it to take into consideration other factors, such as concern for the common good. When a presumption of client autonomy links together with a presumption that corporations exist solely to make money, they form a vicious and unbreakable circle: "Clients can justify asocial action on the ground that counsel have pronounced it not unlawful, while counsel can rationalize their participation by deferring to client autonomy."[96]

In contrast, what might the "joy" of moral lawyering look like in big firm practice? Its foundation is the *must* that highlights the *may* in legal ethics. Moved by an obligation to bring to bear on one's legal work considerations of the common good, a religious lawyer searches out, highlights, and acts on the opportunities to refer to relevant ethical and moral considerations. Moral lawyering presupposes that what is at stake is not just the *lawyer's* own "highly particular" beliefs or a personal "need" to ease one's conscience, but a broader and more objective vision of the common good.

In the corporate context, however, particularly in the representation of publicly traded entities, this is not enough. Ethical and moral considerations may also have to be "sold" to the client — and not only to the individual corporate representative to whom outside counsel refers, but also to the corporate entity as a whole. Even if a particular corporate representative would like to bring concern for the common good to bear on decisions, she may consider her hands tied by the corporation's fiduciary duty to its shareholders to maximize profits.

Thus the specific contribution of a religious lawyer in the big firm context may consist in this: a *must* that highlights the *may*, not only in legal ethics, but also in principles of corporate governance. Moved by an obligation to bring concern for the common good to bear on one's work for a corporate client, a religious lawyer searches out and highlights all of the ways in which a corporate entity *may* bring concern for the common good to bear on its decisions.

Here too, the *may* is already on the books. For example, the *American Law Institute's Principles of Corporate Governance* Section 2.01(b)(2) provides: "Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of

96. Rhode, *Ethical Perspectives*, *supra* note 22, at 625.

its business: [m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business."[97] It should be noted that the text refers to "the conduct of its business," not simply philanthropy on the fringes.[98] The comment notes: "Corporate officials are not less morally obliged than any other citizens to take ethical considerations into account [in making decisions], and it would be unwise social policy to preclude them from doing so."[99] Legally, principles such as these leave plenty of room for ethical and moral considerations.

When concern for the common good must be "sold" to the corporate client, it is also useful to consider the extent to which social responsibility coincides with long-term profit maximization. In counseling and advising corporate clients, the lawyer asks a deep and often complex question: if what the client would like to do is really so contrary to the common good, can it possibly be in the ultimate, true, long-term best interests of the client? If "good" and "harm" are measured beyond the scale of quarterly profits, can it really be that the morally "right" thing to do "harms" the client? The joy of moral lawyering is to discover the extent to which and the ways in which there is "no ultimate split" between a corporation's self interest and the greater public good.[100]

This analysis will be strengthened by an understanding of corporate entities as "social beings."[101] While corporations may be profit driven, they do not generate profit in a vacuum. Business entities function and generate profits in the context of a series of

97. ALI PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(b)(2) (1994) [hereinafter PRINCIPLES OF CORPORATE GOVERNANCE].

98. In fact, corporate philanthropy is treated in a separate provision. *See id.* § 2.01(b)(3) (1994) (The corporation "[m]ay devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.").

99. *Id.* § 2.01 cmt. (h) (1994).

100. *See* Robert C. Solomon, *Corporate Roles, Personal Virtues: An Aristotelean Approach to Business Ethics*, 2 BUS. ETHICS QUARTERLY 317, 322 (1992) ("What is best in us — our virtues — are in turn defined by [the] larger community, and there is therefore no ultimate split of antagonism between individual self-interest and the greater public good."); Rhode, *Ethical Perspectives, supra* note 22, at 623 ("Particularly where clients' true 'interests' are not self-evident, one of the lawyers' greatest potential contributions lies in persuading individuals to act in conformity with their most socially enlightened instinct.").

101. Melvin Aaron Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, The Penumbra Effect, Reciprocity, The Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure*, 28 STETSON L. REV. 1, 19 (1988) (discussing rationale for devoting resources to philanthropic purposes: "[t]he corporation is a social actor. It benefits from the social climate. It is now widely accepted that the corporation should at least consider the social impact of its activities, so as to be aware of the social costs those activities entail").

relationships—internally, with employees, directors and stockholders; and externally, with consumers and the public at large.[102] In fact, a number of state statutes explicitly authorize corporate boards to take into account the impact of corporate decisions on constituencies other than the shareholders.[103]

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102. *See, e.g.*, PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 97, § 2.01 cmt. (f) (1994) ("The modern corporation by its nature creates interdependencies with a variety of groups with whom the corporation has legitimate concerns, such as employees, customers, suppliers, and members of the communities in which the corporation operates. The long-term profitability of the corporation generally depends on meeting the fair expectations of such groups."); *id.* § 2.01 cmt. (h) ("The ethical considerations reasonably regarded as appropriate to the responsible conduct of the business necessarily include ethical responsibilities that may be owed to persons other than shareholders with whom the corporation has a legitimate concern, such as employees, customers, suppliers, and members of the communities within which the corporation operates."); ROBERT C. SOLOMON, ETHICS AND EXCELLENCE: Cooperation and Integrity in Business 146 (1992) ("To think of the corporation as a community is to insist that it cannot be, no matter how vicious its internal politics, a mere collection of self-interested individuals. To see business as a social activity is to see it as a practice that both thrives on competition and presupposes a coherent community of mutually concerned as well as self-interested citizens."); *see also* JOHN PAUL II, CENTESIMUS ANNUS (The Hundredth Year) n.35 (1991) ("The church acknowledges the legitimate role of profit as an indication that a business is functioning well. When a firm makes a profit, this means that productivity factors have been properly employed and corresponding human needs have been duly satisfied. But profitability is not the only indicator of a firm's condition. It is possible for the financial accounts to be in order and yet for the people, who make up the firm's most valuable asset, to be humiliated and their dignity offended. Besides being morally inadmissible, this will eventually have negative repercussions on the firm's economic efficiency. In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs and who form a particular group at the service of the whole society."). For description of an international project in which actual businesses are premised on a concept of the business person "in mutual relationship" with others within the business and in the community, see *Economy of Communion, also known as Economy of Sharing* (visited March 16, 1999) <http://www.focolare.org/en/peco.html> (noting that 750 large and small businesses share profits with those in need and place the person at the center of business operations).

103. *See, e.g.*, ILL. ANN. STAT. ch. 805 § 5/8.85 (Smith-Hurd Supp. 1989) ("In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation, consider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation are located and all other pertinent factors."); *see also* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 97, § 2.01 Reporter's Notes n.8 (1994) (discussing "other constituencies" statutes); Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2258-63 (1990) (listing states which have recently adopted "other constituencies" statutes; also discussing Delaware cases which allow directors to consider the interests of others, so long as there is some reasonable relationship to the long-term interests of

"Amoral" views of business, particularly the perception that making money is the only and ultimate achievement, contradict common business experience, in which corporate decisions are based on the fact that profit is only one indication of a healthy business. Sophisticated business planning and legal counseling recognize that the health of a business is much more complex than raw profit margins.[104]

Businesses must, and do, consider the impact of their decisions on each of the relationships on which they depend: whether internally, in the form of employee relations, safety and morale; or externally, in the form of customer relations, product quality and relations with the public and the government. A common quip is that such decisions are anything but altruistic; these factors are taken into consideration only to avoid bad publicity, government fines and pesky products liability suits — all in function of the bottom line. But whatever the motive and whatever the label (public relations, loss prevention, etc.), such decisions reflect the essence of the nature of a corporate entity as a social being that relies on a network of social relationships for its life, health and growth.

A lawyer with an eye to the common good can begin to see the function of the law in a different light. One vision of the law is as a system of annoying but usually necessary limits to individual and corporate autonomy so that pursuit of power and profit may not be so unrestrained as to expose others to detriment. A lawyer with an eye to the common good can begin to form a different vision: the law itself is an expression of our relationships in a community.[105]

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the shareholders). While these statutes were enacted as an anti-takeover device, the application would seem to be "without limitation" to this context.

104. *See, e.g.*, PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 97, at § 2.01 cmt. (f) (1994) ("Short-term profits may properly be subordinated to recognition that responsible maintenance of [interdependencies on various relationships] is likely to contribute to long-term corporate profit and shareholder gain. The corporation's business may be conducted accordingly."); Solomon, *supra* note 102, at 19 ("The making of money pure and simple is not the culmination of business life."); CENTESIMUS ANNUS, *supra* note 102 (profitability is not the only indicator of a firm's condition); *see also* Caryn L. Beck-Dudley, *No More Quandaries: A Look at Virtue Through the Eyes of Robert Solomon*, 34 AM. BUS. L. J. 117, 126 (1996) (arguing that the most damaging aspect of "amoral" views of business is the perception that making money is the ultimate achievement).

105. For these insights, I am indebted to Maria Voce, an Italian lawyer who is studying the relationship between the person, the community and the law. *See* Maria Voce (1996) (unpublished manuscript on file with the author); *see also* LUBAN, *supra* note 22, at 31 ("[F]air laws are a community's effort to realize its purposes, arrived through accepted political processes. Out of solidarity with your fellows, without which no community can exist, you ought to go along with generally beneficial laws. To disobey or manipulate such laws for your own benefit — say, by hiring an instru-

Just as the essence of my nature as a person is to have as my chief end the common good, to work to maintain the community, the essential nature of a corporate entity, its "truest" good, unfolds in relationships of mutual respect and cooperation with the community — in the internal relationships with employees, managers, directors and shareholders; and in the external relationships with consumers and the public.[106] A lawyer with an eye to the common good works to understand the ways in which the law expresses the nature of these relationships, and how it applies to business decisions, for the ultimate good of the business entity.

This image is painted in broad strokes. Any discussion of its application would start with a flurry of questions and comments about institutional competence. Nonetheless, it can function as a springboard for moving beyond the perception that the client is "harmed" by an effort to consider the common good.

How might these principles come into play? And what about when a corporate representative is not convinced there is "no ultimate split" between it's own self-interest and a broader vision of the public good? Take the hypothetical discussed in the previous section.[107] Lawyer Lana represents a retail clothing chain that is negotiating a contract with a foreign manufacturer that employs twelve-year-old children who are paid five cents an hour. The poverty in the area surrounding the factory is extreme. There are currently no legal restrictions on the import of clothing manufactured by child labor. May Lana bring to bear her visions of the common good in advising the client about the terms of the contract?

Moved by an obligation to bring considerations of the common good to bear on her legal work, Lana seeks out the extent to which the corporation may take ethical and moral principles into consideration without violating the duty to the shareholders to maximize

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mentalist lawyer to find loopholes in the law — insults that solidarity and is disrespectful of your fellow citizens and their collective purposes.").

106. *See* Kagan & Rosen, *supra* note 68, at 438-39 ("Corporate managers, operating under time pressure and intra-corporate rivalries, sometimes fail to consider the full economic and moral implications of their decisions. Sometimes they miscalculate the risks entailed in corporate action or inaction, misperceive the motives or the justice-claims of actual or potential adversaries. In such cases, lawyers might speak for the 'true' economic interests of the corporation, as against the perceptions of particular managers. Moreover, because corporate systems for ensuring compliance with regulatory and liability laws are always vulnerable to slippage and erosion, opportunities exists for lawyers to take the initiative in devising and lobbying for programs to bolster existing corporate safety, environmental protection, and antifraud mechanisms.").

107. *See* discussion *supra* at p.1089.

profits. Her job here is difficult because she does not have a clear legal hook, such as import restrictions, on which to hang her hat. The corporate entity would have been more amenable to considering clear-cut legal restrictions. While there are not yet definite restrictions and liabilities, she has heard rumblings of a class-action suit against various manufacturers on behalf of the foreign workers,[108] and of the near-future possibility of government restrictions and regulation. Lana informs the client of these risks. Because she is a good lawyer who is attentive to the whole gamut of legal risks, she would have advised the client of these possibilities regardless of her concern for the common good.

The client seems willing to risk a potential class action, and proposes a clause to renegotiate the contract in the event of significant changes in import regulations. Lana does not stop here. She is aware that other clothing manufacturers have received significant positive press for agreeing to monitor and enforce child labor standards in the foreign factories with which they have contracts.[109] Lana highlights this as an example of how it could be in the manufacturer's "enlightened self-interest" to agree to a similar compliance program. The manufacturer seems somewhat interested, but not yet moved.

At this point, how far can Lana push the ethical and moral considerations? This is the hard question. The dynamic will depend a great deal on the relationship she has with the client's representative, her status in her own firm and the client's representative's status within the corporate entity. If both Lana and the client's representative are relatively powerful within their own organizations, there would be much more potential for a frank and open conversation along the lines of Elihu Root's advice: "The law lets you do it, but don't. . . . It's a rotten thing to do."[110] If the client still wants to go ahead with no consideration of the problems of child labor, and if Lana's conscience is not satisfied with having raised the issue and having attempted to convince the client, she

108. *See* William Branigin, *Top Clothing Retailers Labeled Labor Abusers; Sweatshops Allegedly Run on U.S. Territory*, WASH. POST, Jan. 14, 1999, at A14 (reporting class actions filed on behalf of foreign garment workers).

109. *See* Lisa Brennan, *Rights Committee Gets Results*, NAT'L L.J., Jan. 25, 1999, at B7.

110. RALPH NADER & WESLEY SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA xvi (1996) (quoting Elihu Root, as attributed by Archibald Cox).

may consider withdrawing rather than lending her legal services to the implementation of the client's goals.[111]

The problem is by no means simple — there is a real conflict; both the religious lawyer and the corporate client face tough decisions. But it is important to note that the decisions are driven neither by the lawyer's rules of professional ethics nor by the client's principles of corporate governance. Neither set of rules stands in the way of bringing considerations of the common good to bear on the decision-making process. Instead, a real barrier to such considerations may be the institutional structures of large businesses and large law firms.

There are several very practical obstacles to deliberating with corporate clients about the way in which their business decisions may impact the common good. Because of the structure of large corporations, often by the time outside law firms are consulted, basic decisions about corporate objectives have already been made.[112] Large businesses typically do not perceive outside counsel as an aid to deliberation about goals, but rather as a tool for implementation of already set goals.[113] Thus, the relationship between corporate

111. *See* MODEL RULES Rule 1.16(b)(3) (stating that a lawyer may withdraw from representing a client if: a client insists on pursuing an objective that the lawyer considers repugnant or imprudent).

112. Gordon, *supra* note 47, at 277 ("Corporations notoriously draw sharp organizational boundaries between themselves and outsiders, reinforced by blood-bonds of loyalty that produce tremendous stress and dissonance in employees trying to play the double-agent's game of serving both the social norms of their professions and company policies."); Kagan & Rosen, *supra* note 68, at 427 (discussing hypothesis that lawyers act as independent and influential counselors: "In dealing with larger corporate clients who have an intelligent and competent management team, I am often faced with decisions which have already been made and asked to support them with legal authority or to make suggestions for minor modifications to meet the requirements of existing law"); Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 298 (1985) (describing the role of a corporation's general counsel, which narrows the function of outside firms: "The law firm tends to become an executor of the general counsel's instructions, with decreasing scope for originality or independent judgement").

113. KRONMAN, *supra* note 6, at 276 (Many large companies "have become more discriminating consumers of outside legal services — more inclined to shop around and to compare the costs and benefits of contracting such work out before deciding which (if any) outside firm to hire."); Kagan & Rosen, *supra* note 68, at 429 ("Growing sophistication among clients has tended to relegate professionals to narrower and more technical roles. . . . Large firms lawyers . . . seem to have willingly adopted a professional ideology that suggests that the lawyer should not be independently influential, but rather a technically adept specialist who tells the corporate manager, 'here are the legal risks, you make the decision.'"); *id.* at 433 (discussing one attorney's sense that "even the lawyers in firms which can . . . be seen as being quite powerful are generally powerful because they choose to serve (in a relatively efficient and powerful manner) forces which are themselves socially and economically powerful");

clients and outside firms is such that it gives "clients little reason to ask for the lawyers' deliberative advice, and the lawyers themselves limited experience in providing it."[114] Kronman describes the ways in which "[l]arge firms have made a conscious effort 'to cultivate the specialized skills base' needed to attract corporate clients . . . by encouraging their lawyers to acquire greater expertise in narrower fields" and "by developing . . . 'a set of structured relationships between specialists in different fields and with different client bases—coordinated teams that permit these firms to offer their corporate clients a wider range of increasingly specialized services.'"[115] Thus, lawyers may have the sense that issues of social significance rarely come up.[116] Or, if they do come up, they may not see them.[117]

The icing on the cake is the internal structure of large law firms. If a lawyer has the sense that a client's goals are repugnant to the

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Rhode, *Professionalism Problem*, *supra* note 18, at 298-99 ("Corporate clients today appear more likely to shop for representation on particular matters, rather than to build long-term relationships with firms that supply representation for most needs. As private practice becomes more competitive, specialized, and transactional, lawyers face intense pressures to satisfy clients' short term desires at the expense of other values. Without a stable relationship of trust and confidence, it is risky for counsel to protest unreasonable demands or to deliver an unwelcome message about what legal rules or legal ethics require."); KRONMAN, *supra* note 6, at 277 (noting a shift from "comprehensive and enduring retainer relationships towards less exclusive and more task-specific ad hoc engagements"); *id.* at 288 ("[T]he more the relationship approximates a one-time encounter between strangers, the more difficult it becomes for a lawyer to provide deliberative assistance . . . in a dependable way . . . [t]he more the lawyer's help is likely to be of an exclusively instrumental sort") For the flip side of this argument, see Gordon, *supra* note 47, at 287 ("[C]ompanies now less often retain the same firm to represent all their interests than they did fifteen years ago, and more often spread legal business, discrete deals or lawsuits among several firms. A law firm thus has less to lose if one of its lawyers risks offending a client by the advice she gives of public positions she supports.").

114. KRONMAN, *supra* note 6, at 290.

115. *Id.* at 275-76. *See also* Robert L. Nelson, *Ideology, Practice and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 537 (1985) ("The vast majority of tasks that lawyers in these firms perform turn on technical matters involving parties of roughly equal status and resources . . . . The social questions of our time simply do not come up frequently in large-firm practice.").

116. Nelson, *supra* note 115, at 538 ("The notion that lawyers struggle with clients over fundamental questions about the common good is simply wrong. Occasionally they will be faced by the dishonest or crooked client, and I do not mean to suggest that this presents trivial problems. But in general, large firm lawyers strive to maximize the substantive interests of their clients within the boundaries of legal ethics.").

117. *See* KRONMAN, *supra* note 6, at 288-89 (As large firm practice becomes more transactional and specialized, "[o]ne important consequence is the decrease in the ability of any single lawyer to see a client's problem as a whole and to address all the issues it presents.").

common good, the ultimate power is to be able to show this client to the door.[118] Most lawyers in large law firms, even junior partners, hardly ever have that power in their hands.

If a lawyer lacks power, of what use is a vision of the common good? Even if for structural reasons it may not become a part of direct conversations with clients, it can inform internal discussions with colleagues about proposals, strategies for negotiation and drafting. For some, it is useful to keep the vision alive for the future, which may bring more substantial contact with the client or an in-house role involving developing policy or insuring compliance.[119]

Recruiting is another sensitive spot where a vision of the common good can impact a law firm's decisions whether or not to represent certain clients. For example, some surmise that what prompted Covington & Burling to withdraw from representing the government-owned South African Airways was pressure from the elite law students it was trying to recruit.[120] Law students should not underestimate the impact they can have on these kind of decisions.

V. On Being a Person Who is a Lawyer at a Big Firm Doing Litigation

Litigation poses particular problems, because in a certain sense "an advocate begins his work only after his client's objectives have been set."[121] It seems there is very little room for deliberation about the common good: "[A]n advocate is the representative of a particular interest in actual or potential conflict with others, and it

118. *See* Carter, *supra* note 12, at 930 ("For religious lawyers, the freedom to follow God even into the practice of the profession is of first importance, and clients who do not like it are free to shop for legal services elsewhere.").

119. *See* KRONMAN, *supra* note 6, at 309-11 ("[L]awyers working in house are more likely to have a relationship that involves them in the client's day-to-day affairs and therefore gives them the contextual knowledge on which real deliberative counseling depends." However, in-house counsel's independent judgment may be more strained: "the fewer the clients on whom a lawyer must depend for his livelihood, the greater the pressure on him will be, in any given case, to conform his opinions to those of his client despite the fact that his professional judgment recommends another view.").

120. Discussed in Simon, *supra* note 93, at 1130 n.99 (citing Morgan, *Bad for Lawyers, Bad for Lawyering*, N.Y. TIMES, Oct. 11, 1985, at A35).

121. KRONMAN, *supra* note 6, at 146. *See* Nelson, *supra* note 115, at 532 ("Litigation presents practitioners with fewer opportunities for giving nonlegal advice . . . the reason is that litigation associates have little contact with clients, and by the time a case is in litigation, it is too late to give nonlegal advice.").

is not his duty to define the collective well-being of those involved or to determine how it can be achieved."[122]

As Kronman explained, this is an overstatement. Advocacy also includes representing clients in the context of private negotiations. In this context, in order to persuade the parties to agree, the lawyer must identify the opportunities for improving the welfare not only of her own client, but also the welfare of the other party.[123] But if settlement and negotiation are out of the picture, is there any room for a litigator to bring to bear considerations of the common good?

Just as corporations generate profits not in a vacuum, but in the context of a set of relationships, advocacy is also not in a vacuum. As Kronman described, "[a] lawyer arguing before a judge who is responsible for maintaining the well-being of the law must himself become a master of analysis from the judicial point of view, for otherwise he will not know what to say to advance his client's cause."[124] The most effective advocacy will be able to empathize with the judicial perspective of the good of society and the internal development of the law. "[T]o be a connoisseur of judging is not simply to know more about adjudicating than others do. It is also to be positively disposed toward its internal good, to possess in some measure a judicial concern for the good the law aims to secure."[125] Of course, judges, lawyers and clients will often have different and conflicting interpretations of what the "good" might be in any given case. But the most effective advocacy will be framed in terms of the "good," not just in terms of a client's narrow interests.

In the context of litigation, concern for the common good would presume a certain level of complexity. Lawyers probably will not face an anguished moral decision every ten minutes.[126] It does not

122. *See id.* at 147.

123. *See id.* at 152.

124. *Id.* at 149.

125. *Id.* at 150 ("An advocate who hopes to make persuasive arguments to judges must thus himself share, to some degree, the civic-minded concerns of the judges before whom he speaks."); Simon, *supra* note 93, at 1122 (quoting John W. Davis' "cardinal rule" of advocacy: "Change places (in your imagination of course) with the Court." *The Argument of an Appeal,* 26 A.B.A. J. 895, 896 (1940)).

126. Matasar's warning against being a constant "whiner" is good advice: "Consistent refusal to attend to even the most mundane matters within [the] practice because they are offensive to one's moral views is arrogance of the highest order. To find immorality in everything others do is to label them, to treat them as moral inferiors, and to assure that they will feel under attack. One who is set to challenge the status quo within the practice cannot fight every practice, every position, every action requested. Instead, one must mix humility with common sense, fight only the battles that are critical to good moral lives, and criticize with care. Such strategic challenges

mean that every time a plaintiff comes knocking on the door, I would advise the client to open the corporate coffers. Rather, it would mean struggling with issues such as whether litigation is the best way to resolve certain social problems; in certain circumstances, the answer to this question may lead to "zealous" advocacy. It may mean struggling with the problematic "public good" questions that can arise from the interaction between litigation and lobbying.

What would this principle look like in practice? Consider a "worst case" scenario—a lawyer who might think she is most justified in saying, "I have no power, there is nothing I can do."[127]

> Shelby is a first year litigation associate at a very large firm that provides legal services to large corporations. Her day to day legal work consists of very specialized and technical research assignments, a hand in drafting sections of motions and briefs, and sporadic cite-checking colleagues' briefs. Her only contact with the corporate client is that occasionally one of her research memoranda winds its way to inside-counsel's desk. Occasionally she helps with depositions and fact gathering, which brings her into contact with witnesses, other lawyers, and opposing counsel. Shelby is deeply religious. In fact, because of her religious convictions, she feels obligated to examine the impact her work has on the common good. Would this religious conviction have any application to Shelby's day-to-day work?

What are Shelby's possibilities? On one hand, it is unlikely that she will be included in conversations of substance about corporate decisions that could influence the common good. On the other hand, she is working within the context of a set of relationships: internal conversations with her colleagues, communications to the court through briefs and motions, and some contact with other lawyers and opposing counsel. In each of these contexts Shelby can bring to bear her concern for the common good.

At some point Shelby's religious views may require her to make a relatively substantial decision about whether to participate in representing certain clients. Shelby's firm represents a large corpo-

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bolster credibility and assure that a protest will be taken seriously." Matasar, *supra* note 67, at 985.

127. *See* Rhode, *Professionalism Problem, supra* note 18, at 307 (quoting Benjamin Sells, *Lawyers Aren't as Trapped as They Think*, S.F. DAILY J., Sept. 12, 1994, at 5 ("Many lawyers seem never to have even entertained the idea that they could actually do something about how law is practiced. A more typical approach seems to be for lawyers to . . . become focused primarily on their self interests . . . and live their work lives with a kind of up-and-out fatalism.").

rate client that continues to produce and profit from products that she concludes, based on religious and social reflection, contribute nothing to the common good and actually harm individuals and society. Assisting in this enterprise, even in the most mundane tasks, would provoke in her a crisis of conscience. For Shelby, this decision probably will be among the easier ones. Her firm is smart enough to have a "conscientious objector" policy, based on which she may simply refuse assignments which she finds morally offensive and refuse to work for certain clients on the same grounds. The firm has a large enough client base such that Shelby can be easily integrated into other work.

Generally, being a junior litigator with an eye to the common good will most often entail much smaller decisions and gestures — honesty, personal integrity and a sense of humanity in the day-to-day tasks of research, gathering and analyzing facts and drafting pleadings and briefs. "The good lawyer does care about the soundness of the legal order."[128] On one hand, a certain "humility" is helpful in light of the steep learning curve in many specialized areas of the law and the fact that there is much to learn about the practice. But while corporate practice does lead to a certain complex understanding about the nature of social relationships, an openness to learning in this context does not necessarily require a "deep humility" about personal values, or a constant "reinvestigation" of most cherished beliefs in light of a particular corporate client's goals.[129]

In fact, a refusal to constantly "reinvestigate" her values in light of a client's goals may be Shelby's shortcut to a mature understanding of what it means to be a good lawyer and an effective litigator. For example, Shelby may receive an assignment from a partner: "Find me a case that supports this proposition." After hours in the library and perusing cases on line in an effort to untangle the law in that particular area, she is convinced that no such case exists and that the proposition is completely contrary to the existing law. She faces a decision: try to please the partner who would really like that case by attempting to construct something based on fuzzy dicta, or simply deliver the bad news? Honesty, professional integrity and her duty of candor to the court[130] lead Shelby to deliver the bad news.

128. KRONMAN, *supra* note 6, at 145.

129. *Cf.* Matasar, *supra* note 67, at 983.

130. *See* MODEL RULES Rule 3.3(a)(3), Candor Toward the Tribunal ("[A] lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling

Shelby will probably quickly discover that this is actually what senior lawyers hope for and expect from junior associates. Perhaps part of the reason why lawyers have the reputation for bending and manipulating the law beyond recognition stems not from the practices of more experienced lawyers, but rather from the fears and misperceptions of junior lawyers. Teresa Stanton Collett's story about one of her first assignments is telling. One of the firm's corporate clients had asked about its ability to do something, and the partner was unsure about the law. Upon receiving the assignment Collett asked, "I need to know what the client wants to do, in order to construct an argument that it can do what it wants." The partner responded:

> Teresa, our job is to find out if the law requires the client to act a particular way. If there is no clear answer under the law, then you must consider the issues the cases identify as important, as well as what your own sense of right and wrong tells you. That is how we decide what advice to give to our clients. This client has been with the firm a long time, and it deserves the best judgment we can give — not merely permission to do whatever it wants.[131]

Shelby may even be rewarded for her refusal to be a "yes man." Her respect for the "internal good" of the law may be appreciated as a sophisticated, responsible, fully engaged contribution to the legal analysis or advice.

In the pressure cooker of getting a brief out, this approach may not always be welcomed. For example, in the process of cite-checking a brief Shelby may find that a certain case does not exactly support a certain legal proposition. After an open-minded discussion with a more senior colleague about what the case means, she may still be convinced that it would be unfair or inaccurate to cite that case for that proposition. She has little power in her hands but she can appeal to her own reputation: "This case does not stand for that proposition. If you decide to leave it in, then

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jurisdiction known to the lawyer to be directly adverse to the position of the client . . . .").

131. Teresa Stanton Collett, *To Be a Professing Woman*, 27 TEX. TECH. L. REV. 1051, 1053 (1996); *see also* GLENDON, *supra* note 11, at 72-3 (describing a partner's reaction when Glendon asked how to respond to a deputy's suggestion that she "make it worth his while" to process a replevin order: "Tell the cretin that Mayer, Freidlich does not pay public servants for doing jobs that they are already paid by the taxpayers to do"); Stewart Macaulay, *Control, Influence, and Attitudes: A Comment on Nelson* (Symposium on the Corporate Law Firm), 37 STAN. L. REV. 553, 559 (1985) ("[G]ood lawyers seldom will be forced to concede, even to themselves, that corporate clients want to break the law.").

take my name off the brief" — if her name was to go on the brief in the first place. She does the same when she encounters factual accounts that seem exaggerated to the point of unfair distortion.

Shelby would not necessarily need a religious vision of the common good to arrive at this understanding and application of her professional obligations. But in moments of pressure, of choosing between what they might be able to get away with and what is right, a religious vision of the common good may help Shelby tenaciously stick to her principles.

But Shelby's religious vision of the common good brings her beyond faithfulness to her professional duties under the ethical codes. Shelby asks herself tough questions when she encounters arguments that could be legally correct but repugnant to a sense of social responsibility. She makes an effort to point out the problems with these arguments. She feels this is a helpful contribution to effective advocacy, because if the analysis bothers her, it may also bother the judge or the jury. She refers to her own sense of personal shame: "If you keep this line of analysis in, I am embarrassed to be associated with this firm." She sees that these comments occasionally move internal conversations toward a more complex and sensitive analysis of the issues.

Like Teresa Stanton Collett, Shelby may meet supervisors and colleagues who strive to consider the common good in their interactions with clients, the court and other lawyers. Some act this way because of religious conviction, others out of a sense of human decency and still others because this is their understanding of what it means to be a good lawyer. Shelby watches these lawyers carefully, and tries to work with them as much as possible. With certain supervisors and colleagues, she is able to build up enough of a relationship of trust such that she can encourage them to talk with her and with others more openly about why they act the way they do. With those who become her friends, she occasionally steers the lunchtime conversation in the direction of this topic.

In the process of corporate defense work, Shelby encounters many complex and painful situations in which people have been hurt. In an attempt to deal with these facts on a day to day basis, Shelby notices that in conversations with colleagues, it is easy to grow cold or even resort to a certain dark humor. With an eye to the common good, she gently reminds her friends that there are human beings involved.

In dealing with opposing counsel, particularly in cases that have been dragging on for years, Shelby encounters a certain "trench

warfare" mentality.[132] She tries to understand the tensions involved, but also sees how the approach can generate needless conflict and expense. Every so often she suggests, "Why don't we just ask them nicely." At times this provokes laughter or comments about her hopeless naiveté, but she notes that occasionally it changes the tenor of the conversation, and at times even the approach.

In comparison with the big picture of what seems to make Corporate America tick, Shelby's small gestures of honesty and civility may seem insignificant. But they are not. They stand as an important critique that may generate deeper discussions about the law firm culture and its interaction with the business culture. Depending on Shelby's style, certain "no's" said with conviction, courage and care for the common good and for all the people involved in the discussion, will be taken not as whining, but rather as openers for deeper reflection. With time, deeper reflection may lead to deeper relationships — even to the point of developing into a community of people who are concerned about the common good. Such a community, even if small, is a powerful seed for change.

Not everyone will understand. One day Shelby converses with a colleague at the coffee machine about whether they should use in an outline for an argument the economic theory "if everyone is responsible then no one is responsible." As they walk down the hallway, she asks her colleague, "Can I ask you a question, as a person? Doesn't that theory bother you, as a person?" The response: "That's just because you didn't understand what I was talking about." Right then and there she cannot come up with a snazzy legal argument why they should not use that theory in the analysis. All she can think of is that if the analysis offended her "regular person" sense of morality, then it might be a non-starter with a jury. But that conversation never arrives to the point of discussing, "If everyone is responsible then I am responsible too."

132. Certain scenes in the movie *Babe* can be an allegory of how lawyers in opposite camps sometimes deal with each other. The scene where the sheepdog is trying to extract important information from the sheep about the pig Babe's role in an incident that led to the death of one of the sheep is particularly telling. As the sheepdog faced the flock, the narrator explained: "Fly [the sheepdog] decided to speak very slowly, for it was a cold fact of nature that sheep were stupid, and no one would persuade her otherwise." And in turn, "The sheep spoke very slowly, for it was a cold fact of nature that wolves were ignorant, and nothing would persuade them otherwise." The effectiveness of the little unprejudiced pig's alternative approach can be a sign of hope and encouragement. *See* BABE (Universal 1995).

Shelby may risk more than being misunderstood. Her "civil disobedience" could be perceived as "whining" which some predict is "guaranteed to marginalize [you] within the workplace."[133] If she keeps it up, she could be risking her long-term career within the firm. As Deborah Rhode observed, "Where legal partnerships entail lifetime commitments, senior attorneys will understandably be wary of advancing anyone who might have difficulty 'getting along' with colleagues or clients."[134]

Shelby need not have a sense of religious conviction to take the risks that she does. But it helps, especially when her decisions may involve the potential for being marginalized, and ultimately rejected. Religion "moves people to give their lives"[135] — for not to take the risk is to let go of what it means to be a person. In the balance, these risks also make sense when Shelby keeps an eye toward the future. Today she is a junior litigation associate. Eventually she may assume a position of responsibility, whether as a partner, as in-house counsel, in government service, or in another area of the public sector. She may find herself making decisions or participating in a decision-making process that will have a more direct impact on the larger community. She may be expected, or at least allowed more room, to bring to the decision-making process concerns for the common good.

But if concern for the common good is squelched for years, it is unrealistic to expect that it suddenly will surface once a person is vested with more responsibility. Tunnel vision and working with blinders to the big picture can easily become a habit with drastic consequences. Like Jiminy Cricket, who keeps walking in the other direction so long as Pinocchio ignores him,[136] a lawyer who fails to keep before her the impact her work and her advice have on the common good runs the risk that the voice of her conscience, ignored for too long, will become softer and softer, and eventually inaudible. A lawyer who does keep before her the impact her legal work has on the common good and who does speak up when concerns arise keeps her conscience alive and exercised. A conscience that is alive and exercised is an important tool, not only for the present, but also for the future.[137]

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133. Matasar, *supra* note 67, at 985.

134. Rhode, *Ethical Perspectives*, *supra* note 22, at 636.

135. Griffin, *supra* note 94, at 1268 (quoting Jacob Neusner, *The Theological Enemies of Religious Studies*, 18 RELIGION 21, 24 (1988)).

136. *See* PINOCCHIO (Walt Disney Pictures 1940).

137. Practically, if during her waking hours a lawyer's only point of reference is the law firm, it may become increasingly difficult to stay attentive to the voice of her

Conclusion

Many have described the woes of the legal profession, and the search for new paradigms. The search party is out for the source of a "[c]ritical mass of men and women with the right stuff to seize the opportunities and avoid the pitfalls in the current situation."[138] Could a part of this "critical mass" be found in men and women with a religious vision of the human person and the common good?

Anthony Kronman observed that to resolve the current crisis in the profession, "What is mainly needed is will — a renewed commitment to this ethic and the courage to make the sacrifices it demands. The key to restoring the profession's failing sense of identity is thus not some new set of refined intellectual techniques .... The crucial factor is resolve: the ability to make and stand by a commitment to serve the public good."[139]

Given the overwhelming disincentives to make and to stand by a commitment to serve the common good, what will be the source of this resolve? Who possesses "the boldness to make a break with the reigning paradigm"?[140] In short, who has the guts? Perhaps the time has come for the profession to recognize a hidden source of will, strength and resolve to make and to stand by a commitment to serve the common good: lawyers who are inspired by religious vision, strengthened by religious experience, and willing to act on this vision.

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conscience because of having lost touch with the communities of family and faith which nourish values and a sense of the common good. Oliver Wendell Holmes's advice to the "Society of Jobbists," those who wished to avoid the trap of "business becoming your master and an end it itself," to those who wished to remain "conscious of ulterior ends," included "strictly controlled" working hours: "for five days alone will it labor, and the other two are all the members' own." GLENDON, *supra* note 11, at 93, 95-6. But not all associates would join the club. *See, e.g.*, Rhode, *Professionalism Problem*, *supra* note 18, at 309 n.148-49 (discussing Walt Bachman's *Law v. Life* account of how associates flocked to other firms when his firm attempted to freeze both salaries and hours).

138. GLENDON, *supra* note 11, at 286.

139. KRONMAN, *supra* note 6, at 365.

140. *See* GLENDON, *supra* note 11, at 287.