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## A Religious Perspective on Legal Practice and Ethics

### Cover Page Footnote

A.A. & Ethel Yossem Professor of Legal Ethics, Creighton University School of Law. B.A., Colgate University, 1974; J.D., Harvard Law School, 1977; M.Div., Yale Divinity School, 1989. An earlier version of this Article was presented in June 1997 at Fordham University School of Law for the Conference, The Relevance of Religion to a Lawyer's Work: An Interfaith Conference, 66 Fordham L. Rev. 1075 (1998). The author wishes to thank the conference participants for their many helpful comments and written responses. The author also wishes to thank Creighton University School of Law for its support of this project. The author gratefully acknowledges the assistance of Creighton Law student Tricia O'Hare, Class of 1998.

# THE THEOLOGICAL PERSPECTIVE

## LAWYERS, CLIENTS, AND COVENANT: A RELIGIOUS PERSPECTIVE ON LEGAL PRACTICE AND ETHICS

Joseph Allegretti\*

### INTRODUCTION

WHAT does religion have to contribute to our thinking about legal ethics and legal practice? The standard answer would probably be “*Not much.*” With the splendid exception of Thomas Shaffer,<sup>1</sup> and a few other unconventional scholars,<sup>2</sup> the study of legal ethics and the legal profession has developed in isolation from the thinking of the great religious traditions about questions of law, justice, and the moral life.<sup>3</sup>

In this Article, I intend to show that the traditional answer is wrong. Religion has much to contribute to legal ethics and to our thinking about the practice of law.

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An earlier version of this Article was presented in June 1997 at Fordham University School of Law for the Conference, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 Fordham L. Rev. 1075 (1998). The author wishes to thank the conference participants for their many helpful comments and written responses. The author also wishes to thank Creighton University School of Law for its support of this project. The author gratefully acknowledges the assistance of Creighton Law student Tricia O'Hare, Class of 1998.

1. Among Shaffer's many writings which explore the relationship between faith and lawyering are *American Lawyers and Their Communities* (with Mary M. Shaffer, 1991) [hereinafter Shaffer, *American Lawyers*]; *Faith and the Professions* (1987) [hereinafter Shaffer, *Faith & Professions*]; *American Legal Ethics: Text, Readings, and Discussion Topics* (1985); *On Being a Christian and a Lawyer* (1981) [hereinafter *On Being a Christian*]. For a sympathetic but not uncritical assessment of Shaffer's approach to legal ethics, see John D. Ayer, *Narrative in the Moral Theology of Tom Shaffer*, 40 J. Legal Educ. 173 (1990); see also 10 J.L. & Religion 277-366 (1993-94) (containing extensive commentary on the work of Shaffer, and comments by him, on the occasion of his receipt of the Journal's award for outstanding contributions to the discipline of law and religion).

2. See *infra* note 63 and accompanying text.

3. An examination of several leading textbooks on legal ethics reveals little or no treatment of the religious dimensions of legal practice or the relevance of religion to legal ethics. See Stephen E. Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (4th ed. 1995); Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* (2d ed. 1994); Thomas D. Morgan & Ronald D. Rotunda, *Professional Responsibility: Problems and Materials* (6th ed. 1995); Deborah L. Rhode & David Luban, *Legal Ethics* (2d ed. 1995); Charles W. Wolfram, *Modern Legal Ethics* (1986).

My argument will be two-fold. In Part One, I will point out some of the ways in which our conception of legal ethics and legal practice is impoverished when we exclude religion from our consideration. In Parts Two and Three, I will provide an example of how religion can illuminate the study of legal practice and ethics by developing the connection between my religious faith and my thinking about legal practice, by presenting and defending what I call a *covenantal model* of lawyer-client relationships.<sup>4</sup>

## I. RELIGION AND LEGAL ETHICS

One way to shed light on the relationship between religion and legal ethics is by comparing the evolution of legal ethics and its sister discipline, bioethics. This comparison clearly reveals the shortcomings that result from an exclusively secular approach to professional ethics.

### A. *A Short History of Bioethics and Legal Ethics*

A useful overview of the development of bioethics has been provided by Daniel Callahan,<sup>5</sup> the long-time president of the Hastings Center, and one of the most prominent and influential thinkers in the field.<sup>6</sup> Callahan traces several stages in the history of this discipline.

In the first stage, throughout the 1960s, theology and theologians dominated the scholarly thinking.<sup>7</sup> Callahan remembers, "When I first became interested in bioethics in the mid-1960s, the only resources were theological or those drawn from within the traditions of medicine, themselves heavily shaped by religion."<sup>8</sup>

In the 1970s, however, bioethics entered a second stage, in which the influence of theology declined dramatically.<sup>9</sup> One reason was that the churches and seminaries shifted their focus to more global concerns such as poverty, racism, and nuclear arms. Equally significant was the pressure "to frame the issues, and to speak, in a common secular mode."<sup>10</sup> In order to influence public policy, and avoid the fractious disputes that often characterize religious disagreements, scholars

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4. While I write as a Christian, persons of different religious traditions will, of course, bring their own faith perspectives to bear upon the issues I address.

5. Daniel Callahan, *Religion and the Secularization of Bioethics*, 20 Hastings Center Report Special Supp. 2 (July/Aug. 1990).

6. Among Callahan's many important works are: *The Troubled Dream of Life: Living with Mortality* (1993); *What Kind of Life: The Limits of Medical Progress* (1990); *Setting Limits: Medical Goals in an Aging Society* (1987). For a critical assessment of some themes in Callahan's work, see 26 Hastings Center Report 2-47 (1996) (collecting a number of articles discussing Callahan's work).

7. Callahan, *supra* note 5, at 2.

8. *Id.* Callahan refers to a number of leading thinkers of this period who were theologians, including Joseph Fletcher, Paul Ramsey, James Gustafson, Seymour Siegel, David Feldman, Richard McCormick, and Charles Curran. *Id.* at 3.

9. *Id.*

10. *Id.*

thought it necessary to adopt a language and an ethics that was not rooted in religion. The philosophers and the lawyers stepped to center stage, which led to the enshrinement of “[a]n ethic of universal principles—especially autonomy, beneficence, and justice . . . .”<sup>11</sup>

Currently, bioethics remains entrenched in this second stage although Callahan holds out the possibility of a third stage in which religion and religious scholarship would reassume their place as a partner in the great debates about the meaning of life and death.<sup>12</sup>

If we shift our attention from bioethics to legal ethics, we notice some interesting similarities and differences. Legal ethics as a field of scholarship dates only from the 1960s and 1970s. The Watergate crisis of the mid-1970s is customarily acknowledged as the stimulus for the development of legal ethics as a distinct field of study and teaching.<sup>13</sup> Legal ethics arose, then, at the same moment when bioethics was breaking free from its religious roots and becoming a secular discipline dominated by philosophy and law.

Indeed, many of the earliest important articles in the field of legal ethics—among them Richard Wasserstrom’s *Lawyers as Professionals: Some Moral Issues*,<sup>14</sup> published in 1975, and Charles Fried’s *The Lawyer as Friend*<sup>15</sup>, published in 1976—are steeped in the Enlightenment tradition that characterizes most scholarly writing about bioethics. Wasserstrom, for example, criticizes lawyer paternalism as violative of client autonomy,<sup>16</sup> while Fried argues that the freedom of human beings to enter into personal relationships implies the right of lawyers to represent whomever they wish.<sup>17</sup>

11. *Id.*

12. *Id.* at 2-4. There are a number of signs of a resurgence of interest in bioethics on the part of religious thinkers. See, e.g., Hessel Bouma, III et al., *Christian Faith, Health, and Medical Practice* (1989); *On Moral Medicine: Theological Perspectives in Medical Ethics* (Stephen E. Lammers & Allen Verhey eds., 1987); Allen Verhey & Stephen E. Lammers, *Theological Voices in Medical Ethics* (1993).

13. Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 *Law & Contemp. Probs.* 193, 194 (1995) (indicating that the American Bar Association mandated the teaching of professional responsibility at ABA-accredited law schools as a direct response to the Watergate scandal). A useful survey of the history of professional responsibility teaching is found in Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 *J. Legal Educ.* 31, 33-42 (1992).

14. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1 (1975). Wasserstrom’s article “may be said to have begun the modern subject of legal ethics.” David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *Geo. J. Legal Ethics* 31, 42 n.39 (1995).

15. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060 (1976).

16. Wasserstrom, *supra* note 14, at 15-24.

17. Fried, *supra* note 15, at 1068-71, 1076-80. Fried does recognize the right of a court to appoint a lawyer to represent a criminal defendant, and acknowledges some duty on the part of a lawyer to represent a client who cannot otherwise find competent counsel. *Id.* at 1078-79.

When we compare the histories of legal ethics and bioethics, the most striking difference is the absence of a formative stage in legal ethics shaped by religion and religious thinkers. From the outset, legal ethics has been dominated by the lawyers and the philosophers.<sup>18</sup> Religion has never played the kind of critical role in legal ethics that it played in the earliest days of bioethics.<sup>19</sup>

### B. *The Costs of a Secularized Legal Ethics*

The divorce of legal ethics from religion has had substantial costs. Let me mention just four; here, too, I am indebted to Callahan and his critique of the secularization of bioethics.<sup>20</sup>

#### 1. The Loss of Religious Wisdom

An exaggerated secularization deprives us of the accumulated wisdom of the religious traditions, which have wrestled for thousands of years with the perennial questions of the moral life.<sup>21</sup> For example, Christianity is concerned with the meaning of human life, its purpose and its destiny. While Christianity insists upon the goodness of human beings, it also speaks honestly about their brokenness and estrangement. It places a high value on self-sacrifice and reconciliation, exhorting believers to "turn the other cheek"<sup>22</sup> and even to lay down their lives for each other.<sup>23</sup> Christianity has something to say about the purposes of law and its limits, the duties owed to the secular state, and the relationship between justice and love.<sup>24</sup>

Most importantly, in the life, death, and resurrection of Jesus Christ, Christianity finds the central revelation about God's purposes for human beings. It entreats those who are followers of Jesus to

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18. Of course, much of the scholarly work in legal ethics takes the form of traditional legal analysis of problems, court cases, and codes. A good introduction to legal ethics scholarship can be obtained by examining current issues of the *Georgetown Journal of Legal Ethics*; see also 1 *J. Inst. Stud. Legal Ethics* 1 (1996) (containing papers delivered at the 1996 Hofstra University School of Law conference, "Legal Ethics: The Core Issues").

19. Interestingly, however, the earliest important writer on legal ethics in America, David Hoffman, was also a Biblical scholar, and the Bible played a part in his analysis of the nature and purpose of law. Shaffer, *Faith & Professions*, *supra* note 1, at 47-53.

20. Callahan, *supra* note 5, at 4.

21. *Id.*

22. *Matthew* 5:38-40 (New Revised Standard 1989). All Biblical citations and quotations in this article are from the New Revised Standard Version.

23. 1 *John* 3:16.

24. These topics are beyond the scope of this Article. Many of the writings of Professor Harold J. Berman treat these and related issues in law and religion. See, e.g., Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993); Harold J. Berman, *The Interaction of Law and Religion* (1974); see also *The Weightier Matters of the Law: Essays on Law and Religion* (John Witte, Jr. & Frank S. Alexander eds., 1988) (collecting essays in honor of Berman).

model their lives in discipleship upon his. Christians are to love one another as Jesus has loved us.<sup>25</sup>

Can anyone deny that this tradition, this way of thinking about life, has something to contribute to our debates about law, ethics, justice, and the role of lawyers? Can anyone deny that Judaism, Islam, and the other religious traditions have something to contribute as well?

Legal ethics benefits when it opens itself to wisdom from every source, when it grants religion a place at the table—not uniquely privileged, of course, but not uniquely disadvantaged either. As Callahan says, whatever we may think about the truth claims of religions, we cannot deny that “they have provided a way of looking at the world and understanding one’s own life that has a fecundity and uniqueness not matched by philosophy, law, or political theory.”<sup>26</sup> We are all impoverished when our moral discourse is limited to the language of rights and autonomy; when Aquinas, Calvin, and Barth are ignored; when Amos, Isaiah, and Jeremiah are deemed irrelevant.

## 2. Law Fills the Void

When religion and the deep wellsprings of the human spirit are excluded from legal ethics, law fills the void.<sup>27</sup> As Callahan notes, the removal of religion “leaves us . . . too heavily dependent upon the law as the working source of morality. The language of the courts and legislatures becomes our only shared means of discourse.”<sup>28</sup> Codes and court decisions become the fundamental arbiter of what is right and wrong.

This development can be seen in the evolution—or, as some suggest, the devolution<sup>29</sup>—of legal ethics codes. The earliest American Bar of Association code of professional conduct for lawyers, dating from the early 1900s, was largely aspirational in nature, more like a gentlemanly code of character than a principled guide to decision-making.<sup>30</sup> The 1969 Code of Professional Responsibility<sup>31</sup> included bottom-line rules of conduct for lawyers, called the Disciplinary Rules,<sup>32</sup> but maintained a link to earlier times by including a number of aspirational goals for lawyers, which were not enforceable, called Ethical Considerations.<sup>33</sup> In the most recent American Bar Associa-

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25. *John* 13:34, 15:12.

26. Callahan, *supra* note 5, at 2.

27. *Id.* at 4.

28. *Id.*

29. Luban & Millemann, *supra* note 14, at 42-53. The article contains an excellent overview of the history of lawyer regulation in America.

30. These were the American Bar Association’s 1908 Canons of Professional Ethics. See Wolfram, *supra* note 3, at 53-56. The Canons were often criticized for their generality, ambiguity, and irrelevance to the actual work of lawyers. *Id.*

31. ABA Code of Professional Responsibility (1969) [hereinafter Model Code].

32. *Id.* at Preamble and Preliminary Statement.

33. *Id.*

tion draft rules for lawyers, the Model Rules of Professional Conduct,<sup>34</sup> the Ethical Considerations are conspicuous by their absence. All that remains are the bottom-line rules and the accompanying comments that serve as aids to their interpretation.<sup>35</sup>

In the shift from *canons of professional ethics*, to a *code of professional responsibility*, to *rules of professional conduct*, we can trace what Luban and Millemann call the "de-moralization" of legal ethics.<sup>36</sup> Reading or teaching the Model Rules, it is easy to embrace the illusion that rules constitute the whole of the moral life, with the result that legality and morality are conflated, and anything legal is assumed to be moral.<sup>37</sup> When this happens, legal ethics is approached not as a subspecies of moral philosophy or professional ethics, but as a course in substantive law akin to torts or corporations.<sup>38</sup> It is no surprise that the leading treatise on legal ethics is entitled simply *The Law of Lawyering*.<sup>39</sup>

Rules are important, of course, for a variety of reasons.<sup>40</sup> Rules reinforce what lawyers already know but may be tempted to forget—they warn lawyers not to lie or to falsify evidence.<sup>41</sup> They establish the ground rules for the trade of lawyering—they instruct lawyers what they can say in their advertisements and write on their business cards.<sup>42</sup> At their best, rules provide lawyers with practical guidance as

34. ABA Model Rules of Professional Conduct (1983) [hereinafter Model Rules].

35. *Id.* at Scope.

36. Luban & Millemann, *supra* note 14, at 45. As the authors recognize, however, some Model Rules do embody moral obligations. *Id.* at n.50. Nevertheless, it "is the moral aspiration that has gradually been excised from American lawyers' professional consensus." Shaffer, *American Lawyers*, *supra* note 1, at 7.

37. See James Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. Legal Educ. 11, 19-20 (1982). Elkins argues that:

By focusing on such a 'bottom line,' one is likely to encourage an ethics based on what lawyers in general are willing to call ethical—the line which may not be crossed by any lawyer. Concentration on the minimum requirements imposed on all lawyers obscures the choice of a standard of behavior for the individual lawyer, a choice that affects personal integrity, self-image, and human aspiration (the spirit as well as the letter of the law).

*Id.* at 20; see also Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 Wm. & Mary L. Rev. 145, 172-76 (1996) ("The common view that legal ethics begins with and ends with the profession's ethics codes is a fundamental mistake . . . . A rule-oriented approach implies that ethics need not be viewed broadly, that is, as an aspect of morality. 'Real' ethics is trivialized or ignored.").

38. See Rhode & Luban, *supra* note 3, at 929 (noting that some legal ethics courses are excessively rule-oriented, with little attention to ethical theory or the realities of legal practice); see also *supra* note 37 and accompanying text.

39. Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (2d ed. 1985 with annual supplements).

40. For an overview of the importance of rules in legal ethics, and their limitations, see Cramton & Koniak, *supra* note 37, at 170-76.

41. See Model Rules, *supra* note 34, Rules 3.3, 3.4, 4.1.

42. See *id.* Rules 7.1, 7.2.

they wrestle with ethical questions. Rules make it possible for lawyers and clients to have reasonably certain standards about what is and what is not expected, required, and prohibited in legal representation. They announce the agreed-upon minimums below which a lawyer cannot fall without incurring sanction, and thereby provide a basis for moral and legal accountability.<sup>43</sup>

Rules, however, are only part of the moral life.<sup>44</sup> Many of the rules implicitly recognize this limitation by vesting discretion in lawyers to decide whether and how to act.<sup>45</sup> Thus, the rules themselves envision that lawyers will exercise personal judgment.<sup>46</sup> Furthermore, while rules can establish legal minimums, they ignore many of the interesting and important issues in legal practice. Rules cannot tell a lawyer whom her clients should be. Rules cannot empower a lawyer to be caring or courageous. They cannot teach a lawyer how to balance a client's lawful interests against the harm that will be done to opponents and third parties. They cannot tell a lawyer whether a tactic or strategy that *can* be employed *should* be employed. Moreover, rules provide no guidance for the lawyer who is grappling with questions that the rules themselves ignore—questions such as the ends of lawyering or the lawyer's moral accountability for her actions.<sup>47</sup> No rule can tell a lawyer if the rule itself should be obeyed.<sup>48</sup> If we are to deal with these profound and fundamental questions, we need a more-en-

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43. While I have been using the word "rules," I am not referring only to the codes of professional conduct governing lawyers. Lawyers are also subject to a wide variety of criminal and civil regulations. See Hazard & Hodes, *supra* note 39, §§ 100-01; see also Cramton & Koniak, *supra* note 37, at 173 ("The fact that the ethics codes provide little guidance on many matters requires that the 'other law' of lawyering receive systematic attention.").

44. See *supra* note 37. For a blistering attack on the very nature of legal ethics rules, see Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 Texas L. Rev. 639 (1981).

45. For a discussion of the discretion granted to lawyers by ethics rules, see Andrew L. Kaufman, *Problems in Professional Responsibility* 765-84 (3d ed. 1989).

46. See Luban & Millemann, *supra* note 14, at 56 ("[T]he *Model Rules* include numerous provisions that tell lawyers what they can do rather than what they can't. These vest substantial discretion in lawyers, and therefore assume that lawyers' judgment must be the ultimate guide to ethical action.").

47. [C]odes have limited effect because they are set within the current horizons of law and medicine. These horizons are assumed to be normative and the codes address only issues concerning how a person, practicing within one of the already established professions, should conduct him or herself. What is missing is any attempt to address the adequacy of the structures and values of the existing professions.

Charles Kammer, *Vocation and the Professions*, in *The Annual of the Society of Christian Ethics* 153, 167-68 (Thomas W. Ogletree ed., 1981).

48. For a recent colloquy on the lawyer's obligation to obey the law, see David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 Wm. & Mary L. Rev. 255 (1996); William H. Simon, *Should Lawyers Obey the Law?*, 38 Wm. & Mary L. Rev. 217 (1996); David B. Wilkins, *In Defense of Law And Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 Wm. & Mary L. Rev. 269 (1996).

compassing approach to legal ethics and legal practice. This leads to my third point.

### 3. The Avoidance of Particularity

When we exclude religion from legal ethics, we are tempted to delude ourselves into thinking that we are not members of particular communities but only one "sprawling, inchoate general community."<sup>49</sup> We are encouraged to keep our private values to ourselves or to hide them beneath a veneer of detached and impartial rationality. As Callahan notes, "[t]ime and again I have been told by religious believers at a conference or symposium that they feared revealing their deepest convictions. They felt that the price of acceptance was to talk the common language, and they were probably right."<sup>50</sup> The result is the trivialization and marginalization of religion—it is reduced to the status of a mere "hobby," as Stephen Carter observes in his book *The Culture of Disbelief*.<sup>51</sup>

We thereby risk excluding questions of character and virtue from our moral reflections. We are tempted to ignore the most important things about ourselves—who we are and want to be, what particular communities and traditions have shaped us into the persons we are, how we see our lives lived against the backdrop of eternity.<sup>52</sup> None of this seems relevant; instead, we feel obligated to speak what Jeffrey Stout calls the "moral esperanto" of autonomy and rights.<sup>53</sup>

But if we are unwilling to ask "who am I?" and "who do I want to be?", how can we hope to answer the question "what should I do?" As Stanley Hauerwas observes, "the kind of quandaries we confront depend on the kind of people we are and the way we have learned to construe the world through our language, habits, and feelings. . . . The question of what I ought to *do* is actually about what I am or ought to be."<sup>54</sup> For example, my thinking about the duties I owe to my client, or to a third party who may be injured by my actions, cannot be divorced from my understanding of myself as a disciple of Christ called to live out the Gospel message of love and reconciliation.<sup>55</sup>

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49. Callahan, *supra* note 5, at 4.

50. *Id.*

51. Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993) (see especially Chapter Two, "God as a Hobby").

52. Thomas Shaffer has explored many of these questions in his writings, especially in *American Lawyers*, *supra* note 1.

53. Jeffrey Stout, *Ethics After Babel: The Languages of Morals and Their Discontents* 74-76 (1988).

54. Stanley Hauerwas, *The Peaceable Kingdom: A Primer in Christian Ethics* 117 (1983). The recent resurgence of interest in virtue-ethics of virtue owes much to theologian Hauerwas and to philosopher Alasdair MacIntyre. See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (2d ed. 1981).

55. See Joseph Allegritti, *Rights, Roles, Relationships: The Wisdom of Solomon and the Ethics of Lawyers*, 25 *Creighton L. Rev.* 1119 (1992).

This broader approach to ethical reflection necessarily encompasses the religious dimensions of the self. Following Paul Tillich, we might conceive of religion as that which concerns us *ultimately*.<sup>56</sup> Defined that way, religion is one of the most important constituents of a person's self-identity. Our religious values are integrally tied up with—the root meaning of the word religion is to tie, to bind—our deepest wishes, dreams, and fears. As Hauerwas reminds us, our religious convictions are themselves a kind of morality.<sup>57</sup> They make certain choices inevitable and others unthinkable.

A professional ethic that envisions the human person as an autonomous rational agent without ties to particular communities and traditions is an ethic that ignores these foundations of the moral life. It is also an ethic that tends to perpetuate the status quo. As Callahan notes, the culturally-free rationalism that dominates bioethics often leads to a “reluctance to question the conventional ends and goals of medicine, thereby running a constant risk of simply legitimating . . . the way things are.”<sup>58</sup> Religious thinking provides a challenge to the status quo by addressing the ends and purposes of medicine, law, and the human person. Christianity, for example, affirms that the Gospel stands in judgment over *all* human institutions, including the legal profession and the justice system.

#### 4. The Needs of Religious Believers

Finally, the exclusion of religion from legal ethics ignores the personal needs of many lawyers.<sup>59</sup> Many lawyers are religious believers in the conventional sense (and if we adopt Tillich's definition, all are religious).<sup>60</sup> These lawyers want not only to abide by their professional codes of conduct, but to act in accord with their deepest values. They want to live a life of purpose and meaning. For such lawyers, rules and codes are a thin gruel that cannot furnish them with the sustenance they need. As Allen Verhey and Stephen Lammers observe, “Members of religious communities—or many of them, at any rate—want to make [the] choices they face with religious integrity, not just impartial rationality.”<sup>61</sup>

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56. Paul Tillich, *The New Being* 152-60 (1955); Paul Tillich, *1 Systematic Theology* 11-12 (1951). Tillich often used the word “faith” to refer to this quality of ultimate concern. See Paul Tillich, *Dynamics of Faith* (1957).

57. Hauerwas, *supra* note 54, at 16 (“[O]ur convictions embody our morality; our beliefs are our actions.”).

58. Callahan, *supra* note 5, at 4; see also *supra* note 47.

59. Callahan, *supra* note 5, at 4.

60. A 1990 survey of church attendance by “elites” found that 15% of corporate lawyers surveyed attended church weekly, 16% monthly, 46% a few times a year, and 24% never. The figures for federal judges were 17% weekly, 20% monthly, 51% yearly, and 12% never. Michael Novak, *Business as a Calling: Work and the Examined Life* 44-45 (1996). Attendance at church, of course, is only one indicator of religiosity.

61. Verhey & Lammers, *supra* note 12, at 5.

For all these reasons, our conceptions of legal ethics and legal practice suffer when we rigidly adhere to a secularistic, legalistic, code-dominated mindset. We need to broaden our perspective to make room for religion as well as philosophy and law.

I am not alone in this view. Indeed, there are several hopeful signs that legal ethics, like bioethics, may be poised to enter a new stage of development in which religion will be allowed to play a meaningful role. No longer is Professor Thomas Shaffer—who has bucked the dominant orthodoxy for twenty years by bringing an explicitly religious dimension to legal ethics—a solitary voice crying in the wilderness.<sup>62</sup> This issue of the *Fordham Law Review* is a prime example, as is last year's Texas Tech School of Law's *Faith and Lawyering Symposium*, a 500-page volume of essays by lawyers and law professors from every imaginable religious tradition.<sup>63</sup> My own book, *The Lawyer's Calling: Christian Faith and Legal Practice*,<sup>64</sup> is another example.

If we agree that religion has *some* role to play in our thinking about legal practice, the next question is: *What role?* What might religion contribute to our thinking about legal ethics and legal practice? There will not be one answer, of course, given the extraordinary variety of religious traditions and the divergent strands of understanding within these traditions. Our religious beliefs are filtered through our unique life experiences, family upbringing, and personality.

With this caveat in mind, I propose now to examine the lawyer-client relationship through the prism of my own understanding of the Christian faith. Consider this a case study of the way in which one believer tries to bring an explicitly religious perspective to bear upon questions of legal ethics and legal practice.

## II. LAWYERS, CLIENTS, AND CONTRACT

In Part Two of this Article, I will look briefly at the relationship between lawyers and clients. I will identify some of the problems that can arise in this relationship, particularly the problem of lawyer or client domination. Then, I will sketch the way in which the legal profession typically deals with this problem of domination—by means of what I call the contractual model of lawyer-client relationships. In Part Three, I will describe and defend a different model rooted in my religious beliefs—a covenantal model—and will compare and contrast it to the contractual model.

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62. See *supra* note 1.

63. *Faith and the Law Symposium: A Symposium Precipitate*, 27 *Tex. Tech L. Rev.* 911 (1996).

64. Joseph Allegritti, *The Lawyer's Calling: Christian Faith and Legal Practice* (1996).

### A. *The Lawyer-Client Relationship*

A core of expectations surrounds the parties to the lawyer-client relationship. According to what David Rosenthal calls the "traditional approach,"<sup>65</sup> clients are expected to be docile and passive. They should trust their lawyers to act in their best interests. They should not ask many questions or take too active a role in their case.

In contrast, lawyers are expected to be aggressive, decisive, and competent. "The traditional idea is that both parties are best served by the professional's assuming broad control over solutions to the problems brought by the client."<sup>66</sup> This traditional model, however, has been sharply criticized in recent years. Critics charge that it encourages lawyers to dominate their clients and act paternalistically towards them.<sup>67</sup>

The reasons for this lawyer dominance are not difficult to understand.<sup>68</sup> Clients are often vulnerable, troubled persons. They frequently lack an understanding of the language or the nuances of the law. They are strangers in the strange land of the courts. They have little choice but to trust in the competence of their lawyer. Con-

65. Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 7-13 (1974). A similar phenomenon has long been recognized in medical circles. The patient, for example, is expected to be passive and trusting of the physician. The classic account of this "sick role" is Talcott Parsons, *The Social System* 428-79 (1951).

66. Rosenthal, *supra* note 65, at 7. Rosenthal, however, argues for what he calls a "participatory model," in which the lawyer and client are engaged in a mutual decision-making process. *Id.* at 7-13.

67. See David Luban, *Paternalism and the Legal Profession*, 1981 *Wis. L. Rev.* 454; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29; Wasserstrom, *supra* note 14; A good overview of the problems of paternalism can be found in Rhode & Luban, *supra* note 3, at 578-620.

68. See, e.g., Wasserstrom, *supra* note 14, at 15-24; Simon, *supra* note 67, at 52-60; Christopher Mooney has provided a useful summary of the "inequality that is intrinsic to all professionalism":

By definition, the lawyer possesses an expertise not easily obtainable outside the profession. Along with this expertise goes a special language by which lawyers communicate with other lawyers but not with clients.

Since communication is one distinguishing characteristic of persons, this fact helps make the client less than a person in the lawyer's eyes. The client has the added disadvantage of not really being able to evaluate how well or badly the lawyer is performing. Not clients but fellow professionals evaluate lawyers, since, unlike clients, they have the power to criticize and regulate effectively.

Finally, clients almost always have some serious life problem, and this tends to render them vulnerable and to induce dependence on lawyers for advice and well-being. This life problem, in turn, naturally leads the lawyer to see the client partially, to focus on that part of his or her person that can be altered, corrected, or otherwise assisted professionally. For all these reasons, the lawyer-client relationship conspires to depersonalize clients in lawyers' eyes and to foster responses to them that are manipulative and paternalistic.

Christopher Mooney, *Law: A Vocation to Justice and Love, in The Professions in Ethical Context: Vocations to Justice and Love* 85 (F. Eigo, O.S.A., ed., 1986).

versely, lawyers have been acculturated to see themselves as "members of an elite . . . different from and somewhat better" than those they are paid to serve.<sup>69</sup>

As a result, lawyers may see their clients not as whole persons, but as something less, as children perhaps, or as broken objects needing to be fixed.<sup>70</sup> Lawyer domination can lead, inexorably, to lawyer paternalism. It is tempting for the lawyer to treat the client "as though the client were an individual who needed to be looked after and controlled, and to have decisions made for him or her by the lawyer, with as little interference from the client as possible."<sup>71</sup>

Lawyer domination discourages a full and frank dialogue between the parties. There is little incentive to discuss moral questions if the lawyer does not view her client as her moral equal. The lawyer may come to bracket her own moral values and see herself not as a moral agent but as a moral neuter whose work is divorced from the rest of her life, including her religious commitments.

Domination, however, is not a one-way street. "[P]rivate practitioners depend wholly on their clients for their livelihood, and this dependence is fundamental in the distribution of power."<sup>72</sup> Furthermore, many clients, especially businesses, are savvy about the legal system and how it works. Such clients are not as dependent upon their lawyer or as vulnerable to manipulation and domination.<sup>73</sup> At times it is the client who controls the relationship or manipulates her lawyer. When this happens, however, the same problems result. Once again the relationship is not one of equality in which the two parties are open to each other. Once again the lawyer brackets her moral values. The lawyer is tempted to become little more than a "hired gun" who will do whatever her client wants as long as the client is paying.<sup>74</sup>

### B. *The Contractual Model*

One way to deal with the problem of domination is to adopt what I call a *contractual model* of the lawyer-client relationship.<sup>75</sup> In medical

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69. Wasserstrom, *supra* note 14, at 18.

70. *Id.* at 21.

71. *Id.* at 22.

72. David Luban, *Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship: A Reply to Steven Ellmann*, 90 Colum. L. Rev. 1004, 1036-37 (1990).

73. Deborah L. Rhode & David Luban, *Legal Ethics* 610 (1st ed. 1992) ("One might wonder, however, whether similar worries about power asymmetries are appropriate in cases involving sophisticated business clients rather than divorce or legal aid clients, particularly since corporate managers often use their own in-house counsel to direct and control outside attorneys.").

74. See Joseph Allegretti, *Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun*, 24 Creighton L. Rev. 747 (1991).

75. A model might be thought of as a "typical vision" or a "distinctive mindset." Avery Dulles, *Models of the Church* 11-12 (expanded edition 1987). Models function largely at the unconscious or pre-cognitive level, and thus can influence our thinking and our behavior without our realizing it. No one model, of course, can capture the

ethics, the contractual model is usually identified with the work of Robert Veatch.<sup>76</sup> Veatch has argued that the problem of domination in professional relations can be dealt with by endorsing a relationship of mutual autonomy and respect. Veatch envisions the parties as coming together to fulfill certain limited goals. Each party has specific obligations towards the other.<sup>77</sup> If either party fails to live up to its promises, the other party can go to court and demand recompense for the breach. The relationship is a matter of *quid pro quo*.

Under this contractual model, each party has primary responsibility for making certain decisions. Veatch explains:

With the contractual model there is a sharing in which the patient has legitimate grounds for trusting that once the basic value framework for medical decision-making is established on the basis of the patient's own values, the myriads of minute medical decisions which must be made day in and day out in the care of the patient will be made by the physician within that frame of reference.<sup>78</sup>

This sharing of power assumes a sharing of relevant information so that each side can make the decisions within its scope of authority on the basis of the relevant facts.<sup>79</sup> The contractual model in medicine relies heavily upon the principle of informed consent.<sup>80</sup>

A similar model applies to the lawyer-client relationship. The lawyer-client relationship is not based solely on contract, of course, and lawyers have certain obligations to clients that go beyond the scope of their contract.<sup>81</sup> Nevertheless, for most lawyers, most of the time, it is the contractual model that sets the parameters for their interactions

whole of reality. Like metaphors, models not only shape reality, they distort it as well. See Milner Ball, *Lying Down Together* 22 (1985).

76. Robert M. Veatch, *A Theory of Medical Ethics* (1981) [hereinafter *Veatch, Theory*]; Robert M. Veatch, *Models for Ethical Medicine in a Revolutionary Age*, 2 *Hastings Center Report* 5 (1972) [hereinafter *Veatch, Models*].

77. Veatch, *Models*, *supra* note 76, at 7; Veatch, *Theory*, *supra* note 76, at 134-37.

78. Veatch, *Models*, *supra* note 76, at 7; see also Harold Brody, *The Physician/Patient Relationship in Medical Ethics* 65-91, 70, (Robert M. Veatch ed., 1989):

By this model, the physician would take responsibility for all purely technical decisions, of the sort for which one is specifically prepared for by medical training. The patient would retain control over decisions that involved personal moral values or life-style preferences, which she could be expected to know more about than the physician could.

*Id.* The Brody chapter contains an excellent overview of the contract model and the criticisms of it.

79. Brody, *supra* note 78, at 70 ("The Contractual Model envisions a process of information exchange and negotiation between the two parties as various decisions are encountered.").

80. *Id.* at 78-82. A good discussion of the doctrine of informed consent can be found in Fay A. Rozovsky, *Consent to Treatment: A Practical Guide* (2d ed. 1990).

81. "The lawyer-client relationship is a complex one founded on contract and agency law but infused with professional ideals and governed in part by regulatory principles flowing from a lawyer's role as an officer of the court." Hazard et al., *supra* note 3, at 472; see also Wolfram, *supra* note 3, at 146 ("The law of contract defines the client-lawyer relationship for many, but hardly for all purposes.").

with clients.<sup>82</sup> A lawyer is hired by a client to help resolve a problem, settle a dispute, or plan a transaction. The lawyer and the client agree upon a fee. Each party has certain specific obligations to the other. If either party fails to meet its obligations, the other party may resort to legal remedies.

The contractual model of lawyer-client relationships presupposes a doctrine of informed consent. Under the Model Rules of Professional Conduct, for example, a lawyer has the duty to provide the client with all relevant information necessary for the client to make important decisions.<sup>83</sup> Furthermore, the contractual model envisions an allocation of decision-making authority along the lines of Veatch's framework for medical decision-making. The traditional rule of thumb is that ultimate decisions (the "ends" of the representation) are for the client, while tactical decisions (the "means" of the representation) are for the lawyer to decide.<sup>84</sup> The Model Rules provide that a lawyer "shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."<sup>85</sup>

The contractual model undoubtedly provides certain needed protections for the parties.<sup>86</sup> The model respects the autonomy of lawyer

82. Recall that the contract model I am describing is not the same as contract law; rather, it is a way of seeing the world, a certain kind of mindset.

83. Model Rule 1.4 provides:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation.

Model Rules, *supra* note 34, Rule 1.4; *see also* Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 Geo. Wash. L. Rev. 307 (1980); Mark Spiegel, *Lawyer and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. Pa. L. Rev. 41 (1979).

84. *See* Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. Davis L. Rev. 1049 (1984); *see also* Wolfram, *supra* note 3, at 156 ("The division of the realms of client and lawyer decision making has been variously phrased as ends-means, substance-procedure, strategy-tactics, or objectives-means.").

85. Model Rules, *supra* note 34, Rule 1.2(a). The Comment to Rule 1.2 states: "The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives." *Id.* Rule 1.2 cmt. The Comment also states, however, that a lawyer is not required to pursue a certain objective or employ a particular means solely because the client insists. *Id.* The Rules recognize that "a clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking." *Id.* The Rules permit the lawyer to limit the objectives of the representation if the client consents. *Id.* Rule 1.2(c).

86. Examining the contract model as it applies to physicians and patients, William May observes:

The notion of the physician as contractor has obvious appeal. First, it breaks with more authoritarian models (such as [the physician as] parent or priest). It emphasizes informed consent rather than blind trust; it encourages respect

and client. It treats the client like an adult rather than a child.<sup>87</sup> It puts the client in control of the ultimate goals of the representation and provides a mechanism whereby the parties can hold each other accountable.

There are serious problems, however, with the contractual model. Although the parties are viewed as rational and autonomous agents who come together to accomplish a specific end, there is no sense that they are engaged in a joint venture in which they might change and grow together. A contractual model is minimalistic and lives by the letter of the law.<sup>88</sup> There is no place in it for "going the extra mile," for doing what the parties are not required to do, for acting with care, compassion, or friendship.<sup>89</sup>

There is an additional defect with this model. We have already seen that in practice one party—often, but not always, the lawyer—can dominate and control the relationship.<sup>90</sup> Although the contractual model is premised on a theoretical equality of bargaining power, it carefully allocates decision-making authority between the parties, in effect conceding that one or the other party must be in control. Its solution to the problem of domination is to draw lines of demarcation to determine which decisions are for the lawyer and which for the client.<sup>91</sup> While the contractual model speaks the language of equality, it functions in practice *as if* weak-willed lawyers need protection from overbearing and manipulating clients or *as if* vulnerable clients need protection from domineering and paternalistic lawyers.<sup>92</sup>

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for the dignity of the patient, who does not, because of illness, forfeit autonomy as a human being; it also encourages specifying rights, duties, conditions, and qualifications that limit the contract. In effect, it establishes some symmetry and mutuality in the relationship between doctor and patient as they exchange information and reach an agreement, tacit or explicit, to exchange goods (money for services).

Second, a contract provides for the legal enforcement of terms on both parties and thus offers each some protection and recourse under the law to make the other accountable under the contract.

Finally, a contract . . . presupposes frankly that self-interest primarily governs people.

William F. May, *The Physician's Covenant: Images of the Healer in Medical Ethics* 117 (1983).

87. *But see* Model Rules, *supra* note 34, Rule 1.14 (dealing with the lawyer-client relationship when the client is a minor or under a disability).

88. May, *supra* note 86, at 118 ("The contractualist approach tends to reduce professional obligation to self-interested minimalism, *quid pro quo*. Do no more for your patients than what the contract calls for: specified services for established fees.").

89. *Id.* at 122 ("The kind of minimalism that a purely contractualist understanding of the professional relationship encourages produces a professional too grudging, too calculating, too lacking in spontaneity, too quickly exhausted to go the second mile with patients along the road of their distress.").

90. *See supra* notes 65-74 and accompanying text.

91. Model Rules, *supra* note 34, Rule 1.2(a).

92. Hazard et al. observes that "discussions of legal ethics are often predicated on opposing assumptions as to which side of the relationship poses danger to the other side or the public interest." Hazard et al., *supra* note 3, at 476. While some scholars

In short, the contractual model encourages that same relationship of "wary strangers" that Callahan criticized in his discussion of the secularization of bioethics.<sup>93</sup> A relationship governed only by contract can degenerate into an uneasy alliance in which each side eyes the other suspiciously, jealously guarding her own prerogatives, and trying to protect herself from the manipulations of the other.<sup>94</sup>

### III. FROM CONTRACT TO COVENANT

With its emphasis on autonomy and legal rights and remedies, the contractual model embodies a stilted and incomplete understanding of persons and relationships. A different model of lawyer-client relationships emerges if we begin from a religious perspective that views human life as both sacred and social.<sup>95</sup>

First, humans are sacred.<sup>96</sup> This is because we are created in the image and likeness of God.<sup>97</sup> Despite our fallibility and sinfulness, human beings are subjects of reverence.<sup>98</sup> Each of us is of unconditional value.<sup>99</sup>

Such an understanding has profound implications for how we should treat each other. As Bouma says, "[t]he biblical message . . . is

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are worried about lawyers dominating and abusing their clients, others view the real problem as "bad" clients whose intent is to bend their lawyers to their will. *Id.*

93. Callahan, *supra* note 5, at 4.

94. Austin Sarat and William Felstiner observed and analyzed the relationships between lawyers and clients in several dozen divorce cases. Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *Law & Soc'y Rev.* 737 (1988). Their conclusions, according to Sarat, were that "lawyer/client interaction in divorce occurs against a background of mutual suspicion, if not antagonism, between lawyers and clients. . . . For divorce lawyers the client is the enemy, or, if not an enemy, then an uncertain and unreliable partner and ally." Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 *J. Legal Educ.* 43, 47 (1991). For a broad examination of the mistrust between lawyers and clients, see Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 *Geo. L.J.* 1015 (1981).

95. Joseph Cardinal Bernardin, *Consistent Ethic of Life* 60 (1988).

96. "One of Christianity's oldest traditions is sacredness of human life as an implication of the Christian conviction about God and the good life." Richard A. McCormick, *Health and Medicine in the Catholic Tradition: Tradition in Transition* 53 (1984) (quoting Albert C. Outler).

97. *Genesis* 1:26. In the New Testament, Jesus is seen as the reflection of God's glory, bearing the very imprint of God's being. *Hebrews* 1:3. Christians, although fallen, are renewed in God's image through the power of the Holy Spirit. 2 *Corinthians* 3:18. See Bouma, *supra* note 12, at 27-66 (exploring some implications of the idea that humans are made in God's image, with special attention to the practice of medicine).

98. Bouma, *supra* note 12, at 31 ("'Sanctity' is the term many religious persons use to characterize that which elicits their reverence. . . . Those who image God are to be loved reverentially, even deferentially.").

99. *The Westminster Dictionary of Christian Ethics* 353 (James F. Childress & John Macquarrie eds., 1986) ("Each individual is infinitely precious to God and made for an eternal destiny.").

that in treating persons we are in an important sense treating God.”<sup>100</sup> The Last Judgment in the Gospel of Matthew makes the point more starkly: “Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it to me.”<sup>101</sup> Some of the same awe, respect, and love that we owe to God should be given to our fellow human beings.<sup>102</sup> Indeed, Jesus taught that the greatest of all commandments was to love God and love our neighbor as ourself.<sup>103</sup> The life and death of Jesus reveal that God’s love for human beings knows no bounds; likewise, we are called to love one another as God has loved us.<sup>104</sup>

Second, human life is not only sacred, it is essentially social.<sup>105</sup> “In the beginning is relation,” says Martin Buber.<sup>106</sup> We become who we are through our relations with each other. We are shaped and formed—and sometimes deformed—by our relationships. As theologian Richard McCormick says, “[O]ur well-being is interdependent. It cannot be conceived of or realistically pursued independently of the good of others. Sociality is part of our being and becoming.”<sup>107</sup>

In short, I encounter and serve my God as I encounter and serve this person, this client. My client and I are not “wary strangers,”<sup>108</sup> isolated and alienated from each other; instead, we share a common destiny that is forged in our encounter with each other.

This understanding impels us to move beyond a contractual model of lawyer-client relationships. My client has unconditional value. I am obligated not only to honor my contractual obligations, but to revere my client as a human being made in the image and likeness of God. I am called to do more than abide by a contract: I believe that I am called to a covenant with my client.<sup>109</sup>

### A. *The Idea Of Covenant*

Covenant is an important theme in both the Hebrew and Christian Scriptures. Indeed, covenant is so central to Scripture that theologian

100. Bouma, *supra* note 12, at 58.

101. *Matthew* 25:40. The Last Judgement is at vv. 31-46.

102. Bouma, *supra* note 12, at 30.

103. *See, e.g., Mark* 12:28-34. By linking love of God with love of neighbor, Jesus combined the teaching of *Deuteronomy* 6:5 and *Leviticus* 19:18.

104. *See, e.g., 1 John* 15:12 and *1 John* 4:19-21.

105. Bernardin, *supra* note 95, at 60.

106. Martin Buber, *I and Thou* 18 (2d ed. 1958); *see also* Bruce C. Birch & Larry L. Rasmussen, *Bible & Ethics in the Christian Life* 69 (rev. & expanded ed., 1989) (“[W]e exist only in relation to something outside ourselves. Apart from social relatedness—or ‘community’—‘we’ do not exist. Neither do ‘I.’”). Birch and Rasmussen’s book contains an excellent discussion of the essential sociality of Christian faith.

107. McCormick, *supra* note 96, at 55.

108. Callahan, *supra* note 5, at 4.

109. Although my approach to lawyer-client relationships is grounded in a religious understanding of persons and relationships, I do not claim that it is necessary to share my religious views in order to embrace the covenantal model that I am describing.

Joseph Allen claims that it "provides a unifying theme in the midst of the multiplicity of the Bible."<sup>110</sup>

The Hebrew Scriptures are replete with covenants between God and humans. There are God's covenants with individuals—Noah,<sup>111</sup> Abraham,<sup>112</sup> and David.<sup>113</sup> Most importantly, there is the covenant at Sinai where the Israelites pledge their obedience to the God who delivered them from the bondage of Egypt.<sup>114</sup> There are also the prophetic condemnations of Israel, which can only be understood in light of the Sinai covenant that the people have forgotten or ignored.<sup>115</sup>

In the New Testament, the concept of covenant is reinterpreted in light of the Incarnation. Jesus is presented as the fulfillment of the Hebrew Scripture promises.<sup>116</sup> Jeremiah had written of a "new covenant" written not on tablets of stone but on the hearts of men and women.<sup>117</sup> For St. Paul, all who have faith in Christ are members of this new covenant.<sup>118</sup> When believers participate in the Lord's Supper, they join in the new covenant of Christ. As Jesus himself said, "[t]his cup is the new covenant in my blood."<sup>119</sup> The promise of Jeremiah becomes a reality in Jesus.

The God who covenants with humanity values each human being individually, irreplaceably, and equally.<sup>120</sup> As God's creatures, made in God's image, humans are imbued with the capacity to covenant with God and with each other.<sup>121</sup> Indeed, human beings are called to reflect God's covenant love for humanity in their relationships with each other.<sup>122</sup> This is what David Smith calls the "principle of replica-

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110. Joseph L. Allen, *Love and Conflict: A Covenantal Model of Christian Ethics* 18 (1984). Allen's book is probably the best examination of the theme of covenant for the general reader. My own discussion owes much to him. Also helpful is George K. Beach, *Covenantal Ethics, in The Life of Choice: Some Liberal Religious Perspectives on Morality* 107-125 (Clark Kucheman ed. 1978). For the application of the covenantal model to professional-client relationships, important resources include Hessel Bouma III, *supra* note 12; May, *supra* note 86; William F. May, *Code, Covenant, Contract, or Philanthropy*, 5 *Hastings Center Report* 29 (1975); Paul Ramsey, *The Patient as Person: Explorations in Medical Ethics* (1970).

111. *Genesis* 9.

112. *Genesis* 12, 15, 17.

113. *2 Samuel* 7.

114. *Exodus* 19-24; *Deuteronomy* 4-6.

115. See, e.g., *Amos* 3 and *Hosea* 1-3; see Allen, *supra* note 110, at 25.

Where the pre-exilic prophets speak judgment upon the people, that judgment makes sense only against the background of the Sinai covenant, for that is what the people have disobeyed. The prophets do not intend to teach a new morality, but rather to call the people back to loyalty and obedience to the covenant.

*Id.*

116. Allen, *supra* note 110, at 28-29.

117. *Jeremiah* 31:31-34.

118. See, e.g., *Romans* 3-4; *Galatians* 3.

119. *191 Corinthians* 11:25.

120. Allen, *supra* note 110, at 66.

121. *Id.* at 67-68, 77-81.

122. *Id.* at 77; see also Bouma, *supra* note 12, at 84.

tion": "As God has committed [God's self] to us, so ought we to commit ourselves to each other."<sup>123</sup>

Human covenants, of course, are not precisely the same as God's covenants. As Bouma observes, "Human covenants are not all-encompassing, as is the call to discipleship, and their origins are not as one-sided as is God's covenanting with us."<sup>124</sup>

Nevertheless, human covenants do resemble God's more-encompassing covenants in certain essential ways. Joseph Allen suggests that covenant as applied to human relationships has three core characteristics:<sup>125</sup> 1) A covenant relationship arises through mutual actions of entrusting and accepting entrustment. In a covenant, each of the parties becomes open and vulnerable to the other;<sup>126</sup> 2) A covenant is a creative act that constitutes a moral community in which the parties have responsibilities to and for each other, responsibilities that go beyond the "letter of the law;"<sup>127</sup> and 3) In a covenant, the parties undertake obligations that will not necessarily end at a specific moment. The responsibilities of covenant members continue over time.<sup>128</sup>

The idea of covenant has broad implications for relationships in general<sup>129</sup> and for lawyer-client relationships in particular. I propose now to examine the lawyer-client relationship in light of Allen's three core elements of covenant. How does a covenantal model of lawyer-client relations differ from the typical contractual model? What obligations does the covenantal model place upon lawyers?<sup>130</sup> What possibilities does it offer?

### B. *Lawyers And Clients Entrust Themselves To Each Other*

In a covenant, the parties entrust themselves to each other. It is easy to recognize how clients entrust themselves to lawyers. When a client comes to a lawyer, the client is usually facing a serious decision or problem. Often the client is emotionally vulnerable. The client may be unfamiliar with the language and processes of the law.<sup>131</sup>

The client has no choice but to place herself in the hands of her lawyer. This entrustment is inevitably accompanied by risk. The law-

123. David H. Smith, *On Paul Ramsey: A Covenant-Centered Ethic for Medicine*, in Verhey & Lammers, *supra* note 12, at 8.

124. Bouma, *supra* note 12, at 84.

125. Allen, *supra* note 110, at 32-39; *see also* Bouma, *supra* note 12, at 84 (following Allen).

126. Allen, *supra* note 110, at 32-37.

127. *Id.* at 37-38.

128. *Id.* at 38-39.

129. For general discussions of the concept of covenant, see the sources cited *supra* note 110.

130. While my focus in this Article is on the implications of covenant for the work and ethics of lawyers, the implications for clients need to be explored as well. *See infra* note 171 and accompanying text.

131. *See supra* notes 66-71 and accompanying text (discussing the reasons why lawyers often dominate their clients).

yer may be incompetent or negligent. She may put her own self-interest before her client's interest. She may treat her client less as an adult than as a child or an object.<sup>132</sup> Human covenants, however, are founded upon *mutual actions* of risk and commitment. The lawyer too must make an act of entrustment.<sup>133</sup> This is perhaps the biggest stumbling block to the forging of a covenant between a lawyer and her client. In too many cases, as we have seen, the lawyer dominates and controls her client (or, conversely, is dominated by the client).<sup>134</sup> It is unrealistic and inaccurate to talk about mutual risk, commitment, and trust when one party sees herself—and is seen by the other—as dominant and in control of the relationship.

There can be no covenant unless and until the lawyer is willing to forge a relationship of true equality and mutual respect. It is not enough to approach the relationship as a matter of contract in which each party has certain agreed-upon obligations to perform. Instead, the lawyer must take the risk of encountering her client as a human being of unconditional value, made in the image and likeness of God, with all the uncertainties and risks that this entails. In a covenant, the lawyer may be challenged. She may be hurt. She may even be changed.<sup>135</sup>

It is a bit like entering a friendship.<sup>136</sup> If I am your friend, I must be willing to learn from you and be challenged by you. If I am unwilling to view our relationship in those terms, then I should not pretend to enter into a friendship that does not exist. If I adopt a fundamentally religious perspective on relationships—to repeat my earlier point, if I see human life as essentially sacred and social<sup>137</sup>—I am better able to make this act of entrustment, because I already recognize that “my client was sent to me by God; God proposes to deal with me through my client.”<sup>138</sup> This understanding frees me to accept the risks and uncertainties of a covenantal relationship with my client.

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132. Wasserstrom, *supra* note 14, at 21.

133. Bouma, *supra* note 12, at 84 (stating that human covenants “are rooted in events or actions, in gifts given or in mutual entrustments whereby persons become vulnerable to one other”).

134. See *supra* notes 72-74 and accompanying text (discussing the reasons why clients sometimes dominate their lawyers).

135. See Shaffer, On Being a Christian, *supra* note 1, at 28 (noting that true moral discourse requires both parties to be open to change).

136. Some legal scholars have analogized the lawyer-client relationship to the relationship between friends. The most well-known argument along these lines is Fried, *supra* note 15. For sharp criticisms of Fried's friendship analogy, see Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 Yale L.J. 573 (1976); Simon, *supra* note 67, at 106-13;

137. See *supra* notes 95-109 and accompanying text.

138. Shaffer, On Being a Christian, *supra* note 1, at 37.

### C. *Lawyers And Clients Constitute A Moral Community*

In a covenant the parties form a moral community in which each has responsibilities to the other. Each affirms the other as one loved by God, unconditionally, and possessing unconditional value. Each is answerable to the other.<sup>139</sup> Theologian William May talks of the *reciprocity* of covenant: Each side needs the other, each side is not only benefactor but beneficiary.<sup>140</sup> Lawyers *need* their clients, not only to earn a living, but to carve out a meaningful and productive life at work.

As I suggested earlier, conventional wisdom can imagine only two ways of relating to clients. Either the lawyer is in charge of the relationship, or the lawyer abdicates personal moral agency and becomes the amoral agent of her client.<sup>141</sup> Ironically, these two approaches, which seem the mirror opposite of each other, betray a fundamental similarity. In both situations, the parties are isolated from each other and closed to change.

This conventional wisdom has little to offer lawyers and clients in a case where the lawyer has moral doubts about a course of action. The lawyer can quit;<sup>142</sup> or the lawyer can stay, suppress her moral doubts, and continue to fight as hard as she can for her client.<sup>143</sup> This narrow vision of the lawyer-client relationship encourages the illusion that the parties are locked into rigid roles, with nothing to contribute to each other. In a covenant, no one is an island. Lawyers and clients are in it together. Together they are more than they are apart.

#### 1. Covenant and Conversion

Consider a case in which a lawyer and a client have a disagreement over a moral issue. Perhaps the client is seeking an end that is lawful but—the lawyer believes—immoral, or the client is pressuring the

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139. Allen explains:

When two or more persons enter into a covenant relationship, they thereby create and enter into a new moral community . . . . Part of what this implies is that they have moral responsibility to, and not only for, one another, that they are answerable to one another. But to belong to the same moral community carries with it a more basic implication: the recognition by each that the other has worth, that each matters for his or her own sake, and not merely that each is useful.

Allen, *supra* note 110, at 37 (emphasis omitted).

140. May, *supra* note 86, at 115-16.

141. See *supra* notes 70-74 and accompanying text.

142. The Model Rules require a lawyer to withdraw from representation if "the representation will result in violation of the rules of professional conduct or other law." Model Rules, *supra* note 34, Rule 1.16(a)(1). The Model Rules permit withdrawal if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent," or if there is "other good cause." *Id.* 1.16(b)(3) & (6). Withdrawal is subject to court approval. *Id.* 1.16(c).

143. When moral doubts are not discussed, they do not disappear, but continue to exert an effect upon the lawyer-client relationship. See *infra* note 170 and accompanying text.

lawyer to adopt a tactic that the lawyer has moral qualms about using. Perhaps, after a full and frank exchange of views, the client will change her mind.

A second possibility is that the parties will explore the issue fully yet fail to reach an accord. Perhaps the lawyer will eventually assert her right of "conscientious objection," as Thomas Shaffer calls it, and refuse to act further for the client.<sup>144</sup> Even in such a case, insists Shaffer, something important has been accomplished, because the parties have listened to and influenced each other, perhaps in ways that could not have been anticipated.<sup>145</sup>

But there is a third possibility as well. Perhaps the lawyer's moral doubts will be dispelled as she listens to her client tell her story. Perhaps the lawyer will come to understand more fully what motivates her client, appreciate and accept her client's objectives, and choose to continue as her client's companion and lawyer. The lawyer may even have to abandon some of her deep-seated biases and beliefs as she comes to know and respect this human being with whom she is in covenant.<sup>146</sup>

If we keep in mind that lawyers and clients form a moral community, we can appreciate the inadequacy of the contract model. The idea of contract cannot capture the richness and open-endedness of the relationship, the possibilities for change and conversion. Rather than speak of the "parties," as we do when we speak of contract, it would be more accurate to talk of the "partners" to a covenant, for the word partner signifies mutual dependence and a joint effort to achieve a common good.<sup>147</sup>

## 2. The Gratuitousness of Covenant

As we saw earlier, a contract model tends to be minimalistic.<sup>148</sup> A lawyer owes her client only what their agreement demands, nothing more.<sup>149</sup> Covenant is not so limited. Our obligations are not so easily discharged. A lawyer in a divorce action, for example, may find herself listening to her client tell a story of abuse and betrayal. What is called for is not only competent legal service, although that is always required,<sup>150</sup> but a compassionate heart as well.

As William May puts it, there is a *gratuitousness* to covenant that contract lacks: The parties go beyond the bottom-line and do things

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144. Shaffer, *On Being a Christian*, *supra* note 1, at 29; *see also supra* note 142.

145. Shaffer, *On Being a Christian*, *supra* note 1, at 29.

146. Theologian Karl Barth expressed this point well: "He who takes the risk of counseling must be prepared to be counseled in turn by his brother if there is need of it." Karl Barth, *The Humanity of God* 87 (1960).

147. Benjamin Sells, *The Soul of the Law* 62 (1994).

148. May, *supra* note 86, at 118; *see also* notes 88-94 and accompanying text.

149. *But see supra* note 81 (discussing the fiduciary obligations of lawyers).

150. *See Model Rules*, *supra* note 34, Rule 1.1 (requiring lawyer competence).

for each other because they recognize a duty to serve, not because they are affirmatively required to do so.<sup>151</sup> It is the difference between a seller's relationship with a buyer and our intimate relationships with friends and family members.

In a covenant, each partner has obligations that are measured not by explicit commitments but by the *needs* of the other. While a contract model assumes an equality in bargaining strength between the parties, covenant is more realistic. Bouma makes the point well:

[C]onditions such as illness, immaturity, and differing expertise can make covenanted people quite unequal. Perhaps they are equal in dignity and worth, but they are not always equal in their ability to express that dignity and worth. So the inequality of people is as relevant to covenantal responsibilities as is their equality. The increased vulnerability of one partner automatically implies greater responsibility on the part of the other.<sup>152</sup>

Covenant places limits on the capacity of the more-powerful to take advantage of the weaker. William May argues that this is an important reason for preferring covenant to contract:

[T]he reduction of ethics to contractualism alone fails to judge the more powerful of the two parties (the professional) by transcendent standards . . . . As opposed to a marketplace contractualist ethic, the biblical notion of covenant obliges the more powerful to accept some responsibility for the more vulnerable and powerless of the two partners.<sup>153</sup>

The more-powerful party (often the lawyer) must understand that what she does for and to the other is judged not by the mathematical minimalism of contract but by the "transcendent standards" of God. A lawyer in covenant sees her client as a human being, a human being in pain and emotional turmoil, not as a mere commodity or fee-payer. Covenant provides a check on selfishness and professional domination that contract does not. It reminds us that we encounter our God as we encounter each other.<sup>154</sup>

#### D. *Lawyers And Clients Have Enduring Responsibilities*

A contract usually has a fixed or limited quality to it. Once a party "discharges" the contract, she is released from her obligations to the other party. Covenants are more enduring: Think of a parent's relationship with her child or a wife's relationship with her husband. There is no fixed terminal point beyond which each person's responsibilities magically disappear.<sup>155</sup>

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151. May, *supra* note 86, at 119-20.

152. Bouma, *supra* note 12, at 87.

153. May, *supra* note 86, at 123-24.

154. See *supra* notes 100-02 and accompanying text.

155. Allen, *supra* note 110, at 38-39.

At first glance, the enduring nature of covenantal relationships may seem to exclude many encounters between lawyers and clients. After all, while some lawyers have ongoing relationships with clients, others represent clients on a one-time basis. Once the client's immediate problem has been resolved, the relationship ends.

By enduring, however, we do not mean eternal (although God's covenant with humanity meets that condition). As Joseph Allen explains, "[t]he responsibility may endure for a shorter or longer time, but it continues throughout the life of that covenant."<sup>156</sup>

So too with lawyers and clients. If a lawyer views her client as a covenant partner, she accepts responsibility for the relationship, not just today or tomorrow, but for as long as it persists. This requires an unswerving allegiance to the other, a steadfastness, a constancy of devotion that continues over time. Although the precise demands upon the lawyer may change, her duty of faithfulness to her partner and to their relationship endures.<sup>157</sup>

The enduring quality of the lawyer-client covenant reminds us that today's actions have lasting consequences.<sup>158</sup> A word spoken in haste cannot easily be retrieved. A small kindness today may bear rich fruit tomorrow. For good or for ill, the actions of covenant partners influence each other in unforeseen ways. Although the lawyer-client contract is finite and limited, covenant has no fixed boundaries.

### E. *The Lawyer as Moral Companion*

There is an additional dimension of covenant that is implicit in our discussion but deserves further attention. As a grizzled old corporate lawyer once told me, "Covenant is a nice idea, professor, but don't forget that sometimes clients pay me to give them a kick in the pants."<sup>159</sup>

Consider again the analogy between covenant and friendship.<sup>160</sup> Lawyers and clients in covenant are not precisely the same as good friends—we do not buy our friends with money—but they are like friends in that each has made a commitment to be open to and to

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156. *Id.* at 38.

157. Indeed, some obligations survive even the termination of the lawyer-client relationship. After the relationship ends, for example, the lawyer's duty of loyalty remains, and she cannot represent a new client against a former client in the same or a similar matter. Model Rules, *supra* note 34, Rule 1.9. The duty of confidentiality also continues beyond the end of the relationship—even beyond the life of the former client. Rule 1.6 cmt.

158. Allen, *supra* note 110, at 38-39.

159. This lawyer's comment brings to mind the words of the lawyer and statesman Elihu Root, "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* 37 (1994) (quoting Root).

160. See *supra* notes 136-38 and accompanying text.

learn from the other. One of the things I want from a friend is a kindly ear, a willingness to listen and to withhold hasty judgments.

But that is not all that I want. I also want honesty and moral companionship from my friend. There are times when a friend, a true friend, will say to me candidly, "Look, that doesn't sound like you. Are you sure that's what you want to do?" A true friend reminds me of the kind of person I aspire to be at my best rather than blindly supporting whatever I choose to do at my worst.<sup>161</sup> In the same way, lawyers can serve as a voice calling clients back to their better selves, reminding clients of their deepest values, loves, and obligations. A lawyer can serve as a moral guide or moral companion to her clients.

Consider a man who comes to a lawyer with a grievance against his son.<sup>162</sup> The client is angry because of his son's announcement that he and his girlfriend are going to have a baby. Marriage is not in their plans. The client, a devout Christian with traditional beliefs, now says to the lawyer, "I want you to rewrite my will and leave my son out of it!"

The lawyer could immediately redraft the will. But if the lawyer knows her client well, and if she sees herself in covenant with her client, then she understands that her responsibilities go beyond the provision of technical legal assistance. The lawyer recognizes that she and her client are in a relationship in which they cannot help but influence each other. Like a good friend, the lawyer cannot help but wonder if what her client demands, in the heat of the moment, is really in her client's best interests. Like a good friend, the lawyer will seek to engage her client in a conversation about the proposed change.

The codes of professional responsibility permit but do not require this kind of moral conversation. Model Rule 2.1 provides that 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."<sup>163</sup> Despite this invitation to engage in moral dialogue, lawyers often refrain from discussing moral concerns with a client. Some lawyers consider themselves to be in control of the rep-

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161. Aristotle wrote, "The perfect kind of friendship, however, is that of good men who resemble one another in virtue. They both wish well to one another as good men, and it is their essential character to be good men. Those who wish well to their friend's sake are friends in the truest sense." Christopher Biffle, *A Guided Tour of Selections From Aristotle's Nicomachean Ethics* 119-120 (1991); *see also* Simon, *supra* note 67, at 108 ("The classical definition of friendship emphasizes, not the adoption by one person of another's ends, but rather the sharing by two people of common ends.").

162. This example is based loosely on Thomas Shaffer, *On Being a Christian*, *supra* note 1, at 3-4.

163. Model Rules, *supra* note 34, Rule 2.1. The Comment goes on to say, "It is proper for a lawyer to refer to relevant moral and ethical considerations when giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." *Id.* Rule 2.1 cmt.

resentation. They see no reason to involve their client in a discussion of such matters. Others regard their client as in control of the representation. They fear that to raise moral issues would be to impose their own values upon their client.<sup>164</sup>

In a true covenant, however, each side must be respected, and each must be free to voice her concerns and worries. It does not violate client autonomy to ask, "Is that really what you want to do?"; or to say, "Let's talk about this some more."

Instead of telling the client who wants to disinherit his son what he *can* do, the lawyer can ask her client to reflect about what he *should* do.<sup>165</sup> Sometimes the lawyer need only speak a single word: *Why?* Why do you say that? Why do you want to do that? This is the essence of the lawyer's role as moral companion: to assume the best about our clients, not the worst;<sup>166</sup> to create a space for clients to think before they act; and to help clients to act in accord with their fundamental values.

Ultimately, of course, the client has the legal right to disinherit his son. If his lawyer decides not to represent him, the client can find another lawyer to redraft the will. But the lawyer does her client and herself a disservice when she does not at least encourage moral reflection and dialogue.<sup>167</sup>

Often the lawyer is uniquely situated to be a catalyst for such moral reflection. A lawyer who represents a corporation on a continuing basis, for example, comes to know her client and its organizational culture. Over time, the client comes to respect and trust the lawyer. With such a history, the lawyer can become a voice for the corporate conscience. When moral questions arise, the lawyer is enough of an insider to be listened to and taken seriously, but enough of an outsider to preserve a needed objectivity and independent moral vision. The

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164. Whether a lawyer dominates her client, or the client controls the lawyer, the result is a similar bracketing of moral questions. See *supra* notes 70-74 and accompanying text.

165. Shaffer reports using a similar hypothetical. After he discusses with his students how to disinherit the son, he asks his students, "Now that you know you *could* do this for this client, I wonder whether you *would* do it." Thomas Shaffer, *On Being a Christian*, *supra* note 1, at 4.

166. See Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 *Cath. U. L. Rev.* 319 (1987).

167. Notice how this notion of the lawyer as moral companion is linked to our earlier discussion of covenant. It is possible to discuss moral issues openly and frankly with a client, without falling into the trap of lawyer domination or client domination, but *only if* there already exists a relationship of mutual respect and trust. If a person proposes to do something foolish, she will probably reject out-of-hand the criticism of a stranger as irrelevant, uncalled for, and overbearing. But she might be willing to listen to a friend who asks her to reconsider her decision, because she knows that her friend wants only what is best for her. Moral companionship presupposes a covenantal relationship.

lawyer can be a voice that asks “why” when everyone else in the company feels compelled to mumble “yes.”<sup>168</sup>

### 1. Saying No to Clients

This raises a related point: There are times when a lawyer must be willing to say “no” to clients. This is necessary not only to preserve the lawyer’s own moral values, but also to preserve an essential element in a true covenant: the freedom to say “no.” Each side must be given the space to be the kind of person she was meant to be. Each must maintain moral accountability for her own actions within a context of shared accountability to and for the other. Neither can become the rubber stamp of the other.

This too is part of the lawyer’s duty towards her clients. To be willing to say, after discussing a matter fully, “I will not do this. I cannot do what you ask.” And to say further, whether explicitly or implicitly, “I’m not sure you want to do it, either.”<sup>169</sup>

If, on the other hand, a lawyer refuses to voice her moral doubts, those doubts do not disappear. Her moral misgivings go underground and fester, contaminating and subverting her dealings with her client.<sup>170</sup> If a lawyer truly respects both her client and herself, she must be willing to voice her worries, fears, frustrations, and resentments. To do so will not necessarily threaten the relationship. In the long run, it can strengthen it, just as Yahweh’s covenant with Israel was deepened and enriched by the willingness of both sides to express honestly their disagreements and disappointments.

### F. *The Costs and Benefits Of Covenant*

This preliminary sketch of the covenantal model has left many issues unexplored. Consider the following: 1) How do we apply the model to lawyers who have only one client—for example, lawyers for large organizations like corporations? 2) How do we apply the covenantal approach to lawyers who do not have clients at all in the conventional sense—prosecutors, for example, and government lawyers? 3) What are the responsibilities of clients towards their lawyers? For example, how should a lawyer relate to clients who have no interest in forging a relationship of mutuality and equality?<sup>171</sup> 4) More broadly,

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168. I discuss the issue of giving moral advice to an institution in more detail in Allegretti, *supra* note 64, at 55-57; see also Shaffer, On Being a Christian, *supra* note 1, at 111-20.

169. In some cases, of course, the lawyer may conclude that her only ethical course is to withdraw from the representation. See *supra* note 142.

170. See Joseph Allegretti, *Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship*, 27 Creighton L. Rev. 1 (1993).

171. A related question is whether differences in religious values between a lawyer and her client might impede the formation of a covenant.

what are the forces in modern legal practice that make it difficult to nurture and maintain covenantal relationships with clients?

These and other questions must be addressed if we are to gain a fuller understanding of the strengths and limitations of the covenantal model. We should remember, of course, that no one model of the lawyer-client relationship captures the whole of reality. Each has its own advantages and disadvantages; each distorts as well as illuminates.<sup>172</sup>

Two points should be made in closing. First, by presenting a covenantal model of lawyer-client relationships, I do not want to give the impression that contract notions are irrelevant. The contract model establishes the bottom line of the relationship. Sometimes that is the only relationship the parties intend; consider, for example, the purchase of an automobile. At other times, covenantal relationships can go awry, and contract stands ready to protect the basic rights of the parties. As Bouma puts it:

The most important and well-intentioned of covenants can break down because of sin, ignorance, or incompetence . . . . [S]ometimes the rupture cannot be healed, and people begin talking through third parties—malpractice or divorce lawyers. At such a point, the bare bones of the covenant must be examined—not for resuscitation but for guidance about the minimal duties and privileges implied in the earlier entrustment. Even when the covenant does not rupture, fallen spouses, preoccupied parents, overly busy professionals, confused clients, and rebellious children sometimes need to be reminded of the minimal claims that can be made, claims that can be asserted as rights rather than requested as charity.<sup>173</sup>

The choice, then, is not between contract or covenant. Covenant builds upon and enlarges contract. Lawyers can choose to approach their work more as a matter of covenant than of contract, but in the real and messy world of the law they will inevitably partake in a bit of both.<sup>174</sup>

Second, although there are risks to adopting a covenantal model, I believe that the benefits are worth the risks. Critics of this approach sometimes claim that it can take too much time and can lead to burnout if lawyers become overly entangled in their clients' troubled

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172. See *supra* note 75.

173. Bouma, *supra* note 12, at 90.

174. We might adopt the language of theologian Reinhold Niebuhr and think of covenant as a kind of *impossible possibility*. Niebuhr used the term to describe the teachings of Jesus at the Sermon on the Mount. Although the ethic of total love expressed in the Sermon on the Mount is impossible for any human being to live out completely, it remains relevant in daily life, for it always judges us, challenges us, and calls us to do more. We can always approximate the Sermon on the Mount more fully in our lives, even if we can never live up to it absolutely. In the same way, covenant is an ideal that we can never live out completely, but can always strive to approximate more closely. Reinhold Niebuhr, *An Interpretation of Christian Ethics* (1935) (especially chapters 2-4).

lives. Critics charge that covenant can tempt lawyers to assume a competence in matters over which they have little or no expertise.

On the other hand, covenant opens the door to a new way of relating to clients. It can give lawyers a sense of connection with their clients. It can help them feel that they are making a difference in their work. Covenant can help tired and disgruntled lawyers regain a sense of meaning and service. Furthermore, clients seem to be happier about their lawyers' work and more satisfied with the results when they have been treated as equal partners in the relationship.<sup>175</sup> Client involvement also improves the quality of the representation—the lawyer has a clearer sense of her client's motives and concerns, and a better picture of what her client wants and needs.<sup>176</sup>

Covenant also allows a lawyer to maintain a sense of moral agency. No longer does she have to live a compartmentalized life where her deepest values are relegated to weekends and evenings. Instead, she and her client are free to discuss moral questions openly because each has the other's trust and is morally accountable to the other. No longer must the lawyer opt either for moral dominance or for moral abdication.<sup>177</sup>

For these reasons, it makes sense to supplement or replace the prevailing contractual model of lawyer-client relationships with the covenantal model. While any lawyer can aspire to a covenantal relationship with her clients, it is a particularly appropriate goal for Christian lawyers who wish to integrate their religious values with their work on behalf of clients. If a lawyer wants to bring her faith and her work together, if she wants to love her God and love her neighbor, if she wants to live a life of discipleship and service, she need look no further than the human being who sits across the desk from her.

### CONCLUSION

This Article has argued that religion has an important role to play in our thinking about legal practice and legal ethics. My argument has been two-fold. First, I pointed out a number of serious problems that result from adopting a rigidly secularistic approach to the study of lawyers and legal practice. Second, I presented a case study of how religion might be brought to bear upon a specific issue in legal practice—namely, the lawyer-client relationship. I do not claim that the covenantal model I have proposed is the best or only means of envisioning the encounter between lawyer and client. I do claim that religion can help us to see that encounter in new and rewarding ways.

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175. See Rosenthal, *supra* note 65.

176. *Id.*; see also Simon, *supra* note 67, at 52-61 (arguing that lawyers often impute to clients a few crude and selfish ends, such as the maximization of wealth).

177. See *supra* notes 70-74 and accompanying text.

*Notes & Observations*