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The Relevance of Religion to a Lawyer's Work: Legal Ethics

Cover Page Footnote
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This symposium is named an interfaith conference; it is also interdisciplinary. In this essay, my focus is on the interdisciplinary question of whether religious studies and theology contribute anything to legal ethics. The assigned topic of legal—instead of general—ethics somewhat skews the interdisciplinary discussion; it suggests that at the intersection of law and religion the traffic travels one way, with religion offering its critique of legal ethics, while "theology and ethics cannot be substantially altered by"1 law. My own perspective is that the proper relationship between legal and religious ethics is an "interaction"—to use James Gustafson's expression—in which each field may be altered by the other. For this reason, I argue in this essay that both theological and religious ethics are important contributors to legal ethics, but that law requires theology's role to be different from that of the related discipline of religious studies.

In this discussion, the usual hard questions about the relationship between law and religion are exacerbated by the focus on ethics. Religious/theological ethics and legal ethics are quite different; theologians and lawyers do not describe the same subject. Religion focuses on broad questions of the meaning of life, and theology focuses on how persons live faithfully within communities and traditions. Religious and theological ethics examine how persons live their entire lives, the kind of persons they become, and the nature of their moral choices. Legal ethics, however, is much more circumscribed. Its core is in codes and rules; it is a technical subject in which one learns, for example, the intricacies of conflicts and of reasonable fees; it is tested on multiple choice exams.

Within legal ethics, religion's role is difficult to define, in part because members of the legal profession disagree about the nature of legal ethics. Legal ethics usually focuses on lawyers' professional standards, standards promulgated in codes or rules that are adopted by state legislatures and Bar associations. Beyond these codes or rules, legal ethics occasionally examines broader questions of professional responsibility, including the lawyer's role in the profession and the

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1. I borrow the metaphor of traffic and intersections of disciplines from James M. Gustafson, Intersections: Science, Theology, and Ethics 136 (1996).
profession's role in society. A recurring question in "professional responsiblity" has been whether the profession's own standards are adequate for a professional ethics, or whether they need to be supplemented by other, non-legal perspectives. This last question about external sources for professional ethics is not unique to law. Doctors and clergy, for example, have debated what standards appropriately govern their professional conduct. In contrast to medicine and ministry, however, a distinctive aspect of legal ethics is that legal regulation (or the threat of lawsuits) does not provide an outsider's outlook. If such a perspective is desired, it must be gleaned from other sources.

In law as well as in ethics, in interdisciplinary as well as in interfaith endeavors, it is axiomatic that one begin with a problem or case that people can "solve" from a variety of perspectives. I abandon that approach here so that we not lose sight of the difficult theoretical questions that surround the interdisciplinary enterprise. I begin instead with a reminder of several possible accounts of legal ethics. First, imagine a so-called standard conception of legal ethics. The most interesting feature of such a conception for my purposes is its sources. The focus is on the attorney-client relationship, and the sources are canons, codes, rules, case law, or statutes. From the inside, as he is practicing law, the individual standard lawyer might bring numerous moral, philosophical, and religious perspectives to his work. From the outside, however, especially from the perspective of other disciplines, the standard view appears empty of important extra-legal sources.

Philosophers, for example, might think that their expertise in moral reasoning is required for any ethical analysis, including legal ethics. In such a view, any ethics is philosophy. So philosophers bring their tools to bear on questions of role, professionalism, confidentiality, and conflicts. A new standard, philosophical view has emerged in some of the literature of legal ethics, challenging the old in its use of sources and its conceptions of the nature of ethics. Sociology too has been employed to illuminate the institutional and social features of the legal profession.

This admittance of other disciplines to legal ethics remains controversial. Philosophy and sociology have been the leading candidates for such insight; religion's role is less evident. Religion remains non-standard, perhaps marginal. Some lawyers, notably Thomas Shaffer, have written for many years about religion's relationship to legal ethics. Yet philosophy and sociology have been more influential; religion appears to be the neglected discipline, notable in its absence. In this essay, I argue that the academic discipline of religious studies at least should have equal status in legal ethics with philosophy. It remains to

be seen if religion can move from the margins to a broader interdisciplinary role.

I. THE RELIGIOUS INDIVIDUAL—CHOICES AND DILEMMAS

Religion already plays some role in legal ethics, even when it is unmentioned in model codes and rules, court cases, and disciplinary proceedings. If legal ethics—like any ethics—incorporates the decisions of individual lawyers about their ethical conduct as attorneys, then, in some way, it includes the conduct of lawyers who are members of religious traditions. We can anticipate that the conduct of "religious" lawyers—whatever percentage of the attorney population they represent—will be influenced by their religious/moral commitments, not just the moral guidelines set out by their profession. After all, without making any sweeping assertions about the relationship between morality and religion, it is safe to say that "[w]hile it is possible to distinguish morality and religion conceptually . . . in most cultures throughout history, the two have been closely connected." This is one way—in current legal ethics, I think the predominant way—to understand the role of religion in the lawyer's life; the believer confronts her religious/moral and her legal/moral obligations and seeks to reconcile the two.

Such a focus puts the spotlight on the individual believer, as much writing about "religious legal ethics" has done. This individual may detect some conflict between her religious commitments and the requirements of the legal profession. For example, one central concern of critics—not only religious critics—of legal ethics has been that this professional ethics might compel the attorney to act—or to omit to act—in a way that violates his fundamental moral convictions. Classic "role morality" critics have asked if the law, with, for example, its adversarial system of justice and its profession-specific moral norms—including special duties of confidentiality and neutrality—requires attorneys to violate what Alan Donagan called the norms of "common morality." A fortiori could religious believers, who might espouse a morality they view as higher than, or superior to, mere "common"

3. The Harper Collins Dictionary of Religion 729 (Jonathan Z. Smith ed., 1995) (defining "morality and religion"); see also Harold J. Berman, Faith and Order: The Reconciliation of Law and Religion x (1993) ("There are, to be sure, some people in the academic world, and many in what may be called the real world, who connect law by emphasizing the link which both have with morality.").


5. See generally Thomas L. Shaffer, On Religious Legal Ethics, 35 Cath. L. 393 (1994) (suggesting that lawyers should “practice law as a ministry”). I distinguish theological from religious ethics in a way that Shaffer does not.

morality, disparage or renounce a profession that requires them to violate their religious/moral convictions. If religions commit their adherents to a morality, while legal ethics obliges its practitioners to its own distinctive morality (or amorality), then we could expect religion to play some role in the individual lawyer's decisions about the practice of law.

In such a description of the role of religion in the lawyer's work, the analysis of religious legal ethics might focus on the dilemmas of the individual attorney's conscience. Within such a "dilemmatic" perspective, some obvious options emerge for the religious lawyer. If religious believers confront tensions between their morality and legal ethics, then their options include, for example, not entering the legal profession; following legal over religious norms; committing civil disobedience to the profession's norms; working to reform the legal system, to render it more consistent with religious morality; or finding some way to reconcile the demands of law and religion, perhaps by recourse to a concept like "common morality." There is precedent in religious traditions for all these alternatives. The choices will vary among and within religions, as individuals seek to discern what their traditions demand in the legal setting.\textsuperscript{7} For some believers, it may be wrong to become a lawyer. Some Christians, for example, who are critical of the state and politics and emphatic about the limitations of all human institutions, might counsel their adherents not to join a corrupt legal system, but to develop counter-cultural systems as a form of Christian witness.\textsuperscript{8} Or what if a Jewish lawyer read "[t]he Jewish tradition's general hostility to an adversarial role"\textsuperscript{9} to prevent his becoming a lawyer in the American legal system? Such rejection of the American legal profession could provide a valuable prophetic witness to lawyers of the frailties of our legal system and its ethics. Yet it seems unlikely that the ABA and American lawyers will pay much


\textsuperscript{8} Allegretti offers an interesting variant on the decision not to become a lawyer; he points out that some people might leave the legal profession because it violates their Christian belief. Allegretti, The Lawyer's Calling, supra note 7, at 11.

\textsuperscript{9} Russell G. Pearce, The Jewish Lawyer's Question, 27 Tex. Tech L. Rev. 1259, 1265 (1996); see also Levinson, supra note 7, at 1607 ("If one takes this seriously, then it would appear that no Orthodox Jew could be a criminal defense lawyer. It would certainly be interesting to find out how many Orthodox lawyers in fact practice in this branch of the law.")
heed to this type of religious commitment; the law might never hear these perspectives, or might reject them as too "radical" to influence or affect the moral norms of the legal profession.

There are other religious people whose beliefs allow them to work within the profession and who struggle to make choices in their work that do not violate their religions. Here is a role that religion plays in the lawyer's work: Religious lawyers will spend time in reflection about what conduct their religious tradition permits or forbids. These reflections may be "dilemmatic" if the attorney occasionally confronts conflicts between his religious and professional obligations. Of course religion is much more than the source of moral dilemmas; it provides the framework or narrative by which many people live their daily lives. Broader religious convictions will affect the choices that lawyers make about their professional lives. For example, religion will influence some to spend their legal careers in service of the poor and others to resist the material pressures of the profession or certain demands by their clients. The religious believer may consult her religious tradition before deciding what type of law to practice or how to treat her clients. The reconciliation of law and religion involves broad moral choices as well as narrow religious dilemmas.

II. THEOLOGY—REFLECTION WITHIN TRADITIONS

Whether in moral dilemmas or in moral choices, religious commitment usually entails some discovery of the principles or norms of the religion. For the committed religious believer, such theological reflection will keep her aware of the norms of religion as she works as a lawyer. I employ "theology" here as it has been used in the Christian tradition, to connote reasoned inquiry into God and God's nature—in its classic formulation, "faith seeking understanding." Not all religious groups employ the term "theology," but I assign it as a label for the process—whatever one names it—in which members of religious traditions engage in the study of—or reflection on—their religious heritage. Religious believers disagree among themselves about the role of reason in this process and about the nature of such reflection; nonetheless, they often engage in interpretation of their communities' fundamental commitments. In theological ethics, religious groups seek to identify and then follow the moral standards of their community of faith or belief.

From the perspective of the individual religious believer who is or wants to be an attorney, we can understand how theology plays an

10. Some writers emphasize the importance of stories in religious legal ethics; the use of stories is an effective reminder that the moral life is more than a series of moral dilemmas. See, e.g., Milner S. Ball, The Word and the Law (1993); Thomas L. Shaffer, On Being a Christian and a Lawyer: Law for the Innocent (1981).

important role in the lawyer's life. If the believer assesses her professional life in light of her religious commitments, then she will have a dual task. Not only will she have to master the profession's ethical standards, but she will also have to weigh these norms against the second standard of the religious commitment. Legal ethics becomes complicated if religion has the primary ethical claim upon the individual. Much of the current concern about religion in legal ethics is "theological" in this sense: It explores or explains the obligations of members of religious traditions and then asks how the religion's demands cohere with those of the legal profession. Academic interest in Christian, Jewish, or Muslim lawyers reflects in part this theological concern that lawyers understand what religious traditions demand of their own adherents.12

If religious adherents must calculate what conduct their religion permits or demands in the American legal system, and if this is what the role of religion in the lawyer's life entails, then the task of lawyers and legal academics might well be to encourage the study of theology. Such study could serve a two-fold purpose: It could help teach religious believers how to act and it could give lawyers of different—or no—religious background an appreciation of the aspirations and motivations of other attorneys. Lawyers might learn that theological interpretation and development of religious traditions are complex tasks, with interesting parallels to their own processes of constitutional and common law interpretation. They might better understand the career and professional choices of their fellow attorneys.

From such a perspective—that is, maintaining our focus on the individual's theology—what is interesting about legal ethics is the way it treats the individual believer. She will ask how the Bar's standards, and in particular its disciplinary proceedings, view her commitment. Legal ethics has no simple response because religious lawyers will behave differently. Religion will provide the motivation for some individuals to respect the profession's ideals and to abide by the Model Code or Model Rules.13 It will lead others to a reverence for the rule of law, or to a commitment to the public interest, or to a quest for integrity in professional life.14 Such coincidence of theological and


13. But see Allegretti, The Lawyer's Calling, supra note 7, at 16 (noting that some Christians may follow the Codes too faithfully, with a resulting "collapse of the lawyer's moral universe, a dilution of his Christian values").

14. See, e.g., Hornblass, supra note 12, at 1649 ("In categorizing a 'Jewish Lawyer,' Professor Levinson would be better advised to stay with the following definition: a Jewish lawyer is one who by virtue of his knowledge of Jewish law, heritage, history, and ethics, is better able to be an excellent lawyer and moral person.").
legal ethics should pose no problem from the profession's viewpoint: Religion might encourage people to be ethical according to the standards of the profession. Thus, the individual could learn that the bar treats her like everyone else. Religious adherents might lead different lives from other lawyers—might favor some types of practice over others, or work for reduced fees, or do more pro bono work—but these choices would fall within the range of options available to all attorneys. Theological and legal worlds do not have to conflict.

Sound moral reasoning and integrity, however, at times put the believer into conflict with the standards—or common practices—of the legal profession. We cannot anticipate that religious views will always support the conclusions of the Model Code or Rules. Religion might be the catalyst that motivates the individual to dissent from the profession's norms. What room, if any, should the profession make for religious dissenters in its disciplinary proceedings? Traditional legal ethics has not promulgated standards for religious dissent. The "law of law and religion," however, provides two alternatives—exemption and civil disobedience—for treatment of the individual who disagrees with the state's norms for theological reasons. Should religious dissenters be granted an exemption from the standard disciplinary norms? Or should their dissent be treated as civil disobedience, which usually requires that one pay the penalty for her violation of the law or professional norm?

In an exemption model, borrowed from Free Exercise jurisprudence, the profession would exempt religious believers from disciplinary proceedings, fines, suspension, or disbarment, when lawyers in good faith disagree with the profession's standards. In a civil disobedience model, the profession would treat religious dissenters as civil disobedients, who may be subject to the penalties associated with their conduct.

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15. We might also characterize this action as conscientious refusal or objection. "[T]here is, of course, in actual situations no sharp distinction between civil disobedience and conscientious refusal. Moreover the same action (or sequence of actions) may have strong elements of both." John Rawls, A Theory of Justice 371 (1971). I think that the distinction is especially hard to use in cases of religious lawyers, if, as Rawls explains, civil disobedience "is an act guided and justified by political principles," id. at 365, while "[c]onscious refusal is not necessarily based on political principles; it may be founded on religious or other principles . . . ." Id. at 369.

Hazard & Hodes provide the helpful expression "conscientious civil disobedience" for these situations. Geoffrey C. Hazard & William Hodes, The Law of Lawyer: A Handbook on the Model Rules of Professional Conduct §1.6:304, at 175 (2d ed. Supp. 1993). In this essay, I refer to the lawyer who commits civil disobedience as the objector.

16. The exemption is considered by Sanford Levinson in the context of a Jewish lawyer who "felt obliged to breach the secular legal duty of confidentiality." Levinson, supra note 7, at 1610. Levinson asked (pre-Religious Freedom Restoration Act): [C]ould one plausibly cite the First Amendment on behalf of a "free exercise" permission to reject the otherwise binding law of the state? The answer is almost certainly negative, especially given the present Supreme Court's hostility to recognizing the exemption of religious minorities from state regulation even in matters that go to the heart of a minority's religious ceremonies.

Id. at 1610-11 (footnotes omitted).
dience model, the penalty is not suspended. The individual attorney breaks the law and can state publicly the reasons for her (mis)conduct or explain why the norms are wrong or inconsistent with her religious beliefs, then accepts whatever penalty the disciplinary committee assesses.

I prefer the civil disobedience model for the law of professional responsibility. Although an exemption approach might demonstrate that the profession takes religion seriously, or that it welcomes religious attorneys, Free Exercise teaches us that exemption is a difficult enterprise. Exemptions may protect religious freedom, but they may also undermine laws of general applicability. Moreover, "religion" is ever more difficult to define; a standard for religious exemp-

17. I do not know how often civil disobedience has been invoked in disciplinary settings. See Mary C. Daly, To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel, 29 Loy. L.A. L. Rev. 1611, 1628-29 (1996). In the context of a symposium on breaking confidentiality when someone confesses to a crime for which an innocent person is about to be executed, Daly states:

As for the doctrine of civil disobedience, its invocation is somewhat unusual. Civil disobedience is traditionally associated with acts that are "public, non-violent, conscientious yet political . . . done with the aim of bringing about a change in the law or policies of government." Dissenters generally engage in civil disobedience to protest the acts of the executive or legislative branch. Although civil disobedience directed to the judicial branch is not unheard of, for example, anti-slavery, anti-segregation and anti-abortion demonstrations, I, however, have located no instances of civil disobedience directed to the judicial branch in its capacity as the regulator of the legal profession. I see no reason why the absence of precedent should be fateful to my claim. My protest is "public" in that I will reveal the protected confidences to the prosecutor's office, the court, and in all likelihood, the media. It is "political" in that it challenges a government decision—the adoption of a code of ethics prohibiting disclosure of past crimes in all circumstances. It is "conscientious" in that it springs from my moral conviction that the application of the ethical obligation of confidentiality will result in an irreparable injury to an innocent third party. Finally, it is being undertaken not merely to save Mr. Smith, but also to show the horrific lengths to which a sound principle can be stretched. If this undertaking is successful, it will act as a catalyst triggering a policy change in the conception of the ethical obligation.

Id. (emphasis added) (alteration in original) (footnotes omitted) (quoting John Rawls, A Theory of Justice 364 (1971)). I am not sure if Professor Freedman's challenge to the advertising and solicitation rules is such an example. See Monroe H. Freedman, Legal Ethics from a Jewish Perspective, 27 Tex. Tech L. Rev. 1131, 1137 (1996) ("Because of personal ethical values, therefore, I deliberately violated professional rules. As expected, the District of Columbia Bar Association brought disciplinary charges against me. The result was the first opinion anywhere approving advertising and solicitation of clients.").

tion would be difficult to set. Familiar or traditional religious views could be favored over non-traditional ones. Exemption has lived a difficult constitutional history; imagine the task that such a policy would set for state Bar associations. The general norms of the profession could weaken if numerous exemptions were granted. We can anticipate fraudulent claims of religious exemption from discipline, yet are reluctant for Bar associations or courts to make determinations of religious sincerity. Self-discipline has been difficult enough for the profession without adding to the Bar’s task the determination of which believers are not bound by the profession’s rules.

In contrast, civil disobedience strikes a different balance. It criticizes particular laws as it respects the rule of law. A professional ethics should be one that is perceived as binding in most circumstances. The client is one important reason to assume that professional norms are binding on lawyers. A professional ethics must protect not only the lawyer’s integrity, but also the client’s well-being. An exemption policy may favor the attorney over the client. It is already difficult for clients to understand the professional obligations of the attorney; clients cannot anticipate that their lawyers are not bound by the general norms of the profession because of theological exemptions. With extensive exemptions, clients might have to discover their lawyer’s theology; clients should not have to investigate possible exemptions by their attorneys. If too much emphasis is given to the lawyer’s theological beliefs, the lawyer may lose sight of her client’s interests. The lawyer should not expect her theological views to govern the profession, nor should she impose theological convictions on the client. Civil disobedience allows the believer to give primacy to his religious convictions, but balances those individual convictions against the needs of the client and the profession.

Even if lawyer and client together want to challenge the norm for theological reasons, civil disobedience remains appropriate. Civil disobedience expresses a dual commitment: to the rule of law and to change the law when it is unjust. When the law is unjust, civil disobedience offers a greater possibility of correcting law’s inadequacies than exemption does. Although they pay the penalty for their conduct, objectors are sometimes right to criticize the law. From their own tradition, religious adherents may gain the insight and the wisdom to know that an ethical standard is deficient. It may be a theological teaching that convinces an attorney that a professional ethical standard is incomplete, and the attorney may be right. From their public criticism, objectors may gain the opportunity to change deficient professional norms. The legal profession needs criticism to improve its own standards; there is no reason to believe that the ethical norms of the legal profession are always correct.
III. Theology's "Translation" into Public Reason

What does it mean for the profession if theological objectors are right? Some may be tempted to conclude that the "correctness" of theology in these circumstances supports the development of a theological legal ethics rooted in the beliefs of dissenters. If religion is theology, then it is important for individuals to learn what their own religious commitments require and to assess the legal profession's norms in light of these convictions—even to discover that the profession is wrong. A greater task for theology, especially the development of a theological legal ethics, is more problematic. Attorneys have good reason to oppose a legal ethics in which the standards are set by the theological convictions of religious lawyers. What if, in the midst of the Bar's on-going debate about confidentiality, Catholic lawyers—to give an extreme and unlikely illustration—asked the profession to adopt the absolute norm of the priest's confidentiality because the lawyer's vocation is also a religious calling?19 Non-Catholics—and even some Catholics—could well be skeptical about the merits of incorporating theological beliefs, beliefs not shared by all lawyers, into a professional ethics.

Any attempt to do so would confront the objections commonly raised about religion when religion and law interact, such as in the First Amendment context or in philosophical accounts of the relationship between religion and politics. Lawyers understand the important values behind the separation of church and state. Religion may be a divisive force, while law and politics are the realms of common ground in which people "agree to disagree"20 about their theological commitments. Like the state, the legal profession cannot be guided by particular norms, but must be ruled by norms and reasons that everyone can share.21 The legal profession does not require a profession of faith, but a commitment to secular notions of justice. Let religious institutions discipline and set standards for their own groups as the First Amendment usually allows them to do so without court interfer-


20. The expression is John Courtney Murray's:
   (1) [W]e can reach an important measure of agreement on the ethical plane;
   (2) we must agree to disagree on the theological plane; (3) but we can reach harmony of action and mutual confidence on the political plane, in virtue of the agreement previously established on the ethical plane, as well as in virtue of a shared concern for the common good of the political community, international and national.

21. I use this expression from The reasons we can share: An attack on the distinction between agent-relative and agent-neutral values, in Christine M. Korsgaard, Creating the Kingdom of Ends 275 (1996).
ence. \(^{22}\) Let religious persons enter or leave the legal profession as conscience allows. The Bar does not discipline according to a theological standard. The legal system's job is to provide a neutral framework that does not establish anyone's religious belief.

Our present system of legal ethics, with codes, rules, and cases devoid of religious reference, along with occasional theological commentary from professors or professing lawyers, presupposes a non-theological profession in which lawyers are governed by principles and guidelines that other lawyers "can reasonably be expected to endorse." \(^{23}\) This is a better option than the alternative of letting theological perspectives set the professional standard. A theological legal ethics should not govern the profession, unless, contrary to our experience, we discover some universal theology that all lawyers—not just religious lawyers—share. The legal profession must be governed by standards of "public reason," by legal and constitutional standards that all lawyers can reasonably be expected to endorse. \(^{24}\)

In a public reason theory of legal ethics, lawyers must translate their theological convictions whenever they seek to influence the profession's norms. Theological objectors should phrase their criticism in the language of public reason. Some theologies cannot make this translation, and their adherents will "opt out" of the profession; but other religious believers can so translate. Religious beliefs should not become the profession's norms as long as they are expressed theologically, in the language of one tradition. Translation does not entail abandonment of one's religious heritage nor does it evidence conformity to law; the point of translation is precisely to bring a critical perspective to bear on the law.

Such a non-theological, public reason legal ethics, however, poses many of the problems that religious writers decry in a religion-less public square. Such critics could complain that a non-theological legal ethics forces individual lawyers to "bracket" their fundamental convictions. \(^{25}\) If the legal profession is regulated by secular norms, then

\(^{22}\) See generally Carl H. Esbeck, Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations, 89 W. Va. L. Rev. 1, 91-104 (1986) (citing recent cases holding that religious officers and members are regulated by their religious institutions).

\(^{23}\) I rely here and throughout on Rawlsian public reason. See, e.g., John Rawls, Political Liberalism 1 (1996).

This ideal is that citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice within the framework of what each sincerely regards as a reasonable political conception of justice, a conception that expresses political values that others as free and equal also might reasonably be expected reasonably [sic] to endorse.

\(^{24}\) Id.

\(^{25}\) Michael Perry has been a proponent of the bracketing criticism. See generally Michael J. Perry, Love and Power: The Role of Religion and Morality in American Politics 5 (1991) (introducing the debate over religion's role in politics and suggesting
believers must divorce their deepest convictions from their work. The professional public reason norm suggests that religion is private and personal, not public. Such a view might even trivialize religious devotion. Perhaps a non-theological legal ethics is not neutral, but hostile to religion. If the legal profession is indeed such an anti-religious environment, then it is not surprising that many writers now turn to theology to remind lawyers of their religious convictions, to demonstrate the value of religious/moral reasoning to the profession, to aid lawyers in reconciling their religious and professional obligations, and to reform a troubled profession. In an era of declining professionalism, theological authors have good reason to criticize any professional ethics that marginalizes the fundamental moral convictions of attorneys—even if these convictions do not comprise the professional norm. If theological objectors are right, some believers may argue that legal ethics should be more “open” to the expression of theological perspectives, that theology should not require translation into public reason or any other secular discourse.

To espouse a public reason theory of legal ethics, however, is not to dismiss theological convictions. The legal profession has good reason to adopt a “secular” or “neutral” ethics. Lawyers’ ethics should be similar to the standard set for politicians, legislators, Supreme Court justices, or citizens who vote about “constitutional essentials and matters of basic justice.” Law is our sphere of public reason. Legal ethics, however, is also a professional ethics, with some norms that are profession-specific. A professional ethics must regulate the interaction of individuals with one another and must have as its focus the role of individual lawyers working on behalf of clients. A professional eth-

ics is incomplete if it ignores the motivation of its actors, assumes that personal moral commitments have no effect on one's professional conduct, or asks its attorneys always to act in disregard of their deepest convictions. "Why be moral?" can be an abstract philosophical question. In professional life, however, it is also a practical question. The perspective of individual attorneys on their moral conduct—whether they act for theological or other reasons—is significant to the entire profession.

It is significant because all lawyers, atheists and agnostics as well as theists and non-theists, need some reason, some motivation, to be moral. An ethics that is only public reason—in this case, codes and rules and Bar norms—is too thin; lawyers would be moral only because they feared disciplinary proceedings. Avoidance of punishment is a minimal moral goal; a profession should strive for more. The profession benefits if religious as well as non-religious viewpoints support good moral reasoning and professional integrity. Legal ethics should not be hostile to theological belief if that belief in fact encourages good professional conduct—or reminds professionals of what such conduct is. The profession has a stake in encouraging religious as well as non-religious convictions that provide compelling personal reasons for lawyers to uphold the norms of their profession. If legal ethics is really the "motor vehicle code," then something else must inspire lawyers to drive safely.

Theology is one of many such inspirations. We can envision that the profession might suffer if there was no room in it for persons of deep moral/religious conviction, if those people did not become lawyers because they read the profession's silence about religion to convey exclusion. Lawyers should be reluctant to impose theological convictions, no matter how noble, on people who do not espouse the same theology. However, theological reasons are acceptable motivations for the individual attorney. Such beliefs guide and inspire her; they are a source of moral insight that can lead the lawyer to support the profession's standards. Let us not over-dramatize theology's role in the moral life of the lawyer; we need not think that believers spend all their time offending other lawyers or trying to translate their theological convictions. The daily life of the religious lawyer is not a series

30. Shaffer, supra note 5, at 397.

My purpose here is to claim legitimacy for religious legal ethics by arguing that most American attorneys should ignore most of what my colleagues in the mansion say about legal ethics, and should regard official "ethics" rules for attorneys the way they regard the motor vehicle code—as an administrative regulation having very little to do with being righteous and an attorney simultaneously. This entails, as I have tried to demonstrate elsewhere, turning to fellow believers in church, temple, and synagogue for moral guidance, and turning to the Bible and our traditions for the professional moral heritage of Jews and Christians.

Id.
of dramatic conflicts between theological/ethical and legal/ethical standards and thus a process of constant confrontation and translation. Instead, religion may give lawyers reason to go about the ordinary tasks of professional life and to conduct themselves as professionals. Bracketing such sources of moral conduct or excluding them because they are theological would undermine a professional ethics.

We can understand the significance of theology to legal ethics if we remember the theory that underlies the public reason of Political Liberalism. Even Rawlsian public reason, which is allegedly too secular,\(^1\) acknowledges that citizens' (religious as well as philosophical) comprehensive doctrines provide them with the rationale and motivation for accepting the political conception of justice, participating in the overlapping consensus, and employing public reason therein. Comprehensive doctrines have a similar role to play in legal ethics.

Rawls insists that religious and philosophical comprehensive doctrines are of equal status. All citizens, whether utilitarians or Kantians, Jews or Muslims, find reasons in their comprehensive doctrines to join the overlapping consensus and then to translate their comprehensive doctrines into public reason when they discuss constitutional essentials and matters of basic justice.\(^2\) Rawls encourages citizens to discuss their comprehensive doctrines in universities, churches and synagogues, and in other social and cultural settings. Citizens, however, must limit their discussion of comprehensive doctrines in other environments. For example, on fundamental political questions, Rawls originally endorsed the “exclusive” view of public reason, which holds that citizens must not give reasons in terms of their comprehensive doctrines. In a well-ordered society, the exclusive view suffices.\(^3\)

However, if a serious disagreement arises in a “nearly well-ordered society,” or if a society is not well-ordered and is divided about constitutional essentials, the “inclusive” view may be more appropriate.\(^4\) In the inclusive view, citizens may at times refer to “their comprehensive doctrine[s], provided they do this in ways that strengthen the ideal

\(^{31}\) Paul F. Campos, Secular Fundamentalism, 94 Colum. L. Rev. 1814, 1825 (1994).

Despite its highly abstract endorsement of moral and religious pluralism, Political Liberalism is ultimately a paean to a secular creed that has within it the potential to become every bit as monistic, compulsory, and intolerant of any significant deviation from social verities as the traditional modes of belief it derided and displaced.


\(^{33}\) Rawls, supra note 23, at 247.

\(^{34}\) Id. at 247-48.
of public reason itself." In divided societies, citizens may doubt each other's commitment to fundamental political values. In the debate over funding for religious schools, for example, atheists may assume that religious citizens argue for funding on the basis of their comprehensive doctrines, and therefore question believers' participation in politics. In that case, public reason is served if the parties "explain in the public forum how one's comprehensive doctrine affirms the political values." Post-Political Liberalism, Rawls has described this inclusive account of public reason as "too narrow" and has proposed a "wide"—but not an "open"—view of public reason. In the "wide" view, Rawls states that "reasonable such doctrines may be introduced in public reason at any time, provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support." This is the "public reason proviso." Rawls continues to reject the "open view: anything goes and all constraints are removed."

In legal ethics, there is good reason to adopt the inclusive view or the public reason proviso—as well as to avoid the open view. Indeed, lawyers should be able to meet the more stringent inclusive standard. If we accept its current portrayals, the legal profession is not a well-ordered society. We read of the "lost lawyer"; the "failing ideals of the legal profession"; the "betrayed profession"; the "crisis in the legal profession." Our profession's commentators note decreasing civility and collegiality, and a decline in mentoring, craftsmanship, and public service. They witness an "excessive degree of adversariness" and too much "arrogance" among lawyers. Lawyers have lost their professional—or moral—Independence and labor under a professional "ideal" too "anemic" to sustain them in their work. Apparently, lawyers have lost their ethical moorings.

In such dire circumstances, recourse to lawyers' comprehensive doctrines is appropriate—if it can enhance the ideal of public reason, which is, in legal ethics, the law, canons, rules, and codes that govern the profession. Perhaps our declining professionalism can be halted if lawyers voice the reasons that lead them to respect the law and its obligations. A profession—especially a troubled one—should encourage discussion about comprehensive doctrines and their impact on the profession. Political public reason encourages extra-political discussion of comprehensive doctrines in universities and in other so-

35. Id. (emphasis added).
36. Id. at 249.
37. Id. at li-lii (emphasis added).
39. See, e.g., sources cited supra note 27.
40. Kronman, supra note 27, at 3.
cial and cultural settings, and, in some circumstances, political discussion of comprehensive doctrines that meets the public reason proviso. In professional education, there should also be room for analysis of comprehensive doctrines. Moreover, in some circumstances, appeal to comprehensive doctrines may be appropriate for the setting of the profession’s norms.

V. Religious Ethics

For Rawls, philosophical and religious comprehensive doctrines have equal status. When law school professional responsibility courses mention Kant or utilitarianism, or employ other philosophical tools and arguments, they imply that philosophical commitments automatically meet the test of public reason. Presumably, if religious arguments are not mentioned, it is because they do not meet that test. A profession that ignores religious comprehensive doctrines or assumes that they cannot meet the test of public reason does “privatize” religion. Religion is public, however, not private. As Jacob Neusner, a leading advocate of the academic discipline of religious studies, has reminded us: “It moves people to give their lives.” If legal ethics is interdisciplinary, and if one accepts the standard of public reason, it is unfair to include only philosophical perspectives on the profession. Theology may motivate individual attorneys within their traditions, but religious arguments belong in the curriculum.

Theology is reflection within a tradition; it is an academic subject. All study of religion, however, is not theology; theological and religious arguments differ. In 1877, in Holland, “[f]or the first time in western academic history, there were established two, parallel possibilities for the study of religion: a humanistic mode within the secular academy and a theological course of study within the denominational seminary.” In the twentieth century, religious stud-


[I]n general religion has come increasingly to be treated, during the past two generations, as solely a private matter, “what the individual does with his own solitariness” (in Alfred North Whitehead’s definition), while law has come increasingly to be treated as solely a public matter, a matter of social policy.

Id.; see also id. at 232 (“This, indeed, is what the courts have done when they have said that religion is the private affair of each individual, a matter of his or her personal choice, rather than a matter of the collective identity of a nation made up of religiously diverse communities.”).


To Holland belongs the distinction of having been the first country to make adequate provision for the study of the subject in her higher schools. A decree was passed in 1876, by which the theological faculties of the four Dutch universities—Leiden, Amsterdam, Utrecht, and Groningen—were changed from mere training schools for ministers of a certain denomination into purely scientific bodies of the same order as the philosophical, law, and
ies found its way into the "secular academy," while theology often remained in the seminaries. Indeed, "religion" is a product of the academy, "a creation of the scholar's study." Religious studies is characterized by secularity; "the study of religion is a uniquely Western phenomenon, flourishing in particular under secular auspices on the one side, or under the auspices of religious people attempting to address a secular, or at least an alien, world on the other."

In some cultures and in some environments, theology is the only appropriate study of religion. In the United States, however, religious studies has flourished because of our public university system and our commitment to the separation of church and state. Following the Supreme Court's distinction, religion scholars equated religious studies to teaching about religion and equated theology to teaching of religion. Neither religion scholars nor courts have had an easy time with the religious studies/theology or the about/of distinction. Religion scholars have sought a scientific study of religion, but the nature of the science is not obvious. They have searched for a study of religion that does not presuppose faith or belief in God—although the medical faculties. All the subjects represented—Old and New Testament, Church History, Dogmatics—were henceforth to be taught as purely historical disciplines and from a purely scientific point of view, the specific training for the service of the Church being left to supplemental courses provided for by each denomination, or relegated to non-official separate seminaries. At the same time the important step was taken of adding to each of the four faculties a chair for the general and comparative History of Religions.

45. Neusner, supra note 41, at 49.
46. See generally Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) ("And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching about religion, as distinguished from the teaching of religion, in the public schools."); Conrad Cherry, Hurrying Toward Zion: Universities, Divinity Schools, and American Protestantism 90 (1995) (arguing that "teaching about religion, as distinct from instruction in religion, is an acceptable undertaking of public institutions").

One of the problems in discussing the study of religions, especially as it applies to academic study, is that it involves a number of different disciplines or methods. The overall study has been described as polymethodic[ ]. There is some question as to whether the study of religion(s) can be referred to as a discipline at all.

Id. at 500; see also Michel Meslin, From the History of Religions to Religious Anthropology: A Necessary Reappraisal, in The History of Religions 31, 32 (Joseph M. Kitagawa ed., 1985).
preeminent historian of religion insisted that the study of religion must include the distinctive “element of the sacred.” Religious studies examines religion(s); in its favorite sub-disciplines—comparative religion(s) and history of religion(s)—it compares them and historically situates and interprets them. Sometimes it asks, for example, if religions have universal features or what the implications of religious difference are.

Despite much conceptual confusion in religious studies, it has always defined itself in contrast to theology. Joseph Kitagawa described the difference this way: “Unlike philosophy of religion and theology, however, the history of religions does not ‘endorse’ any particular system offered by the diverse religions of the world, nor does it advocate, as many ultra-liberals think it ought, any new universal synthetic religion.” Theology is tradition-dependent; it accepts that normative claims are appropriately made within traditions. Religious studies has tried to transcend different traditions and, in its intellectual development and its quest for academic respectability, has viewed theology as its opponent.

In one sense, religious studies and law share a common experience in their rejection of theology. If religious studies and law strive to maintain neutrality or objectivity—or secularity—then theology’s commitment to a particular tradition, or its faith in a particular God, is suspect. Theology should be more pertinent to religious studies than to law; the broad discipline of religious studies must at least recognize theology as one aspect of its study. Surveys of religion departments, however, suggest that many religion professors deride theology and dismiss it from the academy. Among many religion professors, it is axiomatic that the law bars theology from the public university because teaching theology establishes religion. We should not be sur-


[A] religious phenomenon will only be recognized as such if it is grasped at its own level, that is to say, if it is studied as something religious. To try to grasp the essence of such a phenomenon by means of physiology, psychology, sociology, economics, linguistics, art or any other study is false; it misses the one unique and irreducible element in it—the element of the sacred. Obviously there are no purely religious phenomena; no phenomenon can be solely and exclusively religious. . . . I do not mean to deny the usefulness of approaching the religious phenomenon from various different angles; but it must be looked at first of all in itself, in that which belongs to it alone and can be explained in no other terms.

Id.


prised if law shares this suspicion of theology. The law should remain suspicious when theology becomes evangelism, or when it proposes theological standards for lawyers. Theological discussion in legal education should not be "open." Theological language that meets the public reason proviso, however, might be valuable in some discussions of legal ethics. The profession should appreciate the theology that encourages individuals to be good lawyers and to object when the profession's norms appear inadequate. It is a mistake in religious studies and in law to ignore theological traditions entirely.

In law, however, the skepticism about theology often extends to religious studies. Religious studies' valiant effort to separate itself from theology has had little apparent impact on the legal profession, and religious ethics has had little impact on legal ethics. Religious ethics is a "hermeneutical, critical, and practical enterprise."

As a "hermeneutical" enterprise, religious ethics may be classified with certain other disciplines (e.g., philosophy of religion) whose character is formed more by a set of enduring questions than by a certain subject matter. If the hermeneutical character of contemporary ethics can be summarized in terms of a concern to track and understand the diverse ways human beings engage in justifying normative judgments, the critical and practical character of ethics lies in the search for wisdom about the nature and shape of the good life.

In legal education and legal-academic writing, legal ethics now includes some philosophical, sociological, and economic analysis of the profession and its norms. The contribution of religious ethics is less certain. If utilitarianism and Kantianism, consequentialism and deontology, are becoming standard ethical terms for lawyers, then lawyers should learn that the religious ethical traditions are also comprehensi-

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The study of religion should be distinguished from the practice of it. In the context of the state university that assumption was understood institutionally in terms of the separation of church from state and theoretically in terms of the distinction between theology and the academic study of religion. A conscious effort was made to develop or take a descriptive, analytical, non-normative, and even (following the Supreme Court in Schempp [374 U.S. 203 (1963)]) an "objective" approach to the subject. However, as we are reminded more than once on these pages, the shapers of this developing discipline or enterprise were almost all trained in theology and ordained as clergymen. How to move from the theological seminary to the secular university, from the church to the state, from theology to the academic study of the subject, from the teaching of religion to the teaching about religion?

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52. See Levinson, supra note 7, at 1604 (noting that, in most law schools, students with moral questions are directed to moral philosophy, not religion). "Rarely, if ever, does one hear suggestions that privileged guidance might be found in religious traditions and their notions of ethical duties." Id. at 1604-05.


54. Id.
ble, not merely personal or private accounts of morality. Religion is public; secular religious studies easily meets the requirements of public reason and the secular curriculum. For example, perhaps the modern rejection of "salvation" has indeed undermined our professional work ethic and left us with an "anemic" professional ideal, as Dean Kronman suggests.\textsuperscript{55} The comparative study of religion addresses this aspect of the moral life. In his work on comparative religion, Ronald Green has argued that the "deep structure" of all religions includes as its third essential element "a series of 'transmoral' beliefs that suspend moral judgment and retribution when this is needed to overcome moral paralysis and despair."\textsuperscript{56} This element exists in some tension with element two, "a set of beliefs affirming the reality of moral retribution."\textsuperscript{57} Why this tension? Because religions recognize that the hopes of "upright persons . . . to end life surrounded by wealth and progeny" as well as the hopes of the righteous "that more just rewards will soon follow" "are usually dashed by experience."\textsuperscript{58} Religions may address the dashed hopes of human experience, including the dashed hopes of lost lawyers. The insights of the world's religions about work and meaning—and thus about professionalism—can rival Aristotle's. This does not mean that everyone will share those insights; nor is everyone Kantian or Aristotelian. Religion and philosophy, however, should have equal status.

I concede that, in our society and in our legal culture, philosophical argument appears more appropriate for resolving disputes. Amy Gutmann and Dennis Thompson have noted that when moral disagreement occurs in political deliberation, many theorists have turned to utilitarianism to resolve disputes. "Utilitarianism is the most influential—and still most widely accepted—way of attempting to resolve moral conflicts that arise in the making of public policy."\textsuperscript{59} We should expect utilitarianism to be similarly influential in setting policies for the legal profession. As Gutmann and Thompson point out, its three features—its "single inclusive end;" its consequentialism; and its method of calculating consequences—offer the "promise" of resolving moral conflict in deliberative democracy.\textsuperscript{60} So too, perhaps, in legal ethics.

Yet Gutmann and Thompson conclude that "utilitarianism cannot completely keep this promise;"\textsuperscript{61} "utilitarianism can only be one

\textsuperscript{55} Kronman, \textit{supra} note 27, at 370-72.
\textsuperscript{56} Ronald M. Green, Religion and Moral Reason: A New Method for Comparative Study 3 (1988).
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 17.
\textsuperscript{59} Amy Gutmann & Dennis Thompson, Democracy and Disagreement 165 (1996).
\textsuperscript{60} \textit{Id.} at 169-73.
\textsuperscript{61} \textit{Id.} at 172.
method among many." In Rawlsian terms, utilitarianism is only one of many possible comprehensive doctrines. It is not entitled to any privileged place. "If utilitarians are to remain deliberative democrats, then they must let deliberation put utilitarianism in its place." Thus citizens "may appeal to utilitarian considerations" and also to "other kinds of moral considerations." In legal ethics, consequentialism has offered the promise of resolving ethical disputes; it must, however, take its place alongside other comprehensive doctrines.

Religion has its place in the promulgation of ethical standards. Theology, as I have described it above, is important for understanding the individual lawyer's perspective. It may persuade her to avoid, to dissent from, to join the profession, or to practice law in certain ways. The public reason proviso encourages theological lawyers to explain why they enter the legal profession and why they are committed to professional ideals. Religious studies includes analysis of such commitment, but its aims are academic. Theology too is academic, but its scholarship is committed to a tradition, a tradition that not all citizens, lawyers, or religion scholars share. Theology's influence is on the choices of the individual lawyer, while religion's potential effect is on the norms of the legal profession. When individual believers consult their conscience, they may object to the profession's norms for theological reasons and, if they translate their convictions into public reason, then seek to reform the profession's standards. Moreover, the law's acceptance of secular argument means that the profession has some reason to listen to religious studies in formulating its standards, not just in professional education.

Some attorneys will argue that the law of lawyering is complete in its codes, rules, and cases and needs neither philosophical nor religious ethics. Legal ethics is the set of ethical standards agreed to by the profession. It is the profession's public reason; let religion and philosophy keep their distance. The law of lawyering, however, is dif-

62. Id. at 196.
63. Id.
64. Id.
65. See David Wasserman, Should a Good Lawyer Do the Right Thing?: David Luban on the Morality of Adversary Representation, 49 Md. L. Rev. 392, 395 (1990) (essay review) ("Despite his claim to steer a middle course, Luban's approach ultimately favors acts over policies. It is really a form of 'sophisticated' act consequentialism, taking account of roles, policies, and acts only to the extent that they bear on the consequences of specific acts."); id. at 397 ("[T]he four-fold root is intended to provide a consequentialist justification for morally dissonant role-acts . . . ."); id. at 402 n.61 ("[T]he four-fold root provides a strictly consequentialist justification."). But see David Luban, Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice, 49 Md. L. Rev. 424, 431-32 (1990) ("The fourfold root, however, can be sung in a deontological rather than a consequentialist key. . . . The point of the fourfold root on this deontological reading is [to help] determine how strong the duty of confidentiality really is."); id. at 433 ("[The book] equivocates between two understandings of institutional excuses, which I have characterized as 'consequentialist' and 'deontological.'").
different from other areas of the law; it is not the same as constitutional
law or tort law, even though those fields set some parameters for the
enforcement of professional responsibility. We return to this odd no-
tion of "legal ethics." 66 As an ethics, legal ethics has some dubious
features. 67 Most troubling is the criticism that its standards are deter-
mined by the self-interest of the lawyers who write and enforce the
rules. 68 Professionals are not always the best guardians of profes-
sional ethics. We learn this, for example, in the history of medical
ethics. "Although physicians are reluctant to concede it, during the
past twenty years the most significant reforms in medicine have been
brought about by outsiders. . . . While some doctors were important in
introducing these changes, the medical profession left to itself would

66. See Ball, supra note 10, at 96.
   I must begin by noting a radical variance between my understanding of eth-
ics and that of the State Bar of Georgia, to which I belong. In order to
remain an active member of the bar, I am required to take twelve hours of
continuing legal education every year. One (formerly two) of those hours
must be in ethics. What is taught under the rubric of ethics seems to me a
gross distortion. At my first session years ago, the lecturer began by stating
that his assignment was to teach us "how to keep the money you earn in
your own pocket"—that is, how to avoid being successfully sued for mal-
practice. Every session since has been devoted to the same subject, malprac-
tice avoidance. I do not recall the word ethics being used during that first
session or during any other since. When I use the word ethics I do not adopt
the bar's definition. I do not mean hints about staying out of trouble with
the bar and clients: "How can I avoid malpractice?" Like Thomas Shaffer,
when I use the word ethics I mean ethics, reflection on the question "what
am I to do?" For me, this is a question about response to the Word.
Id.; see also Thomas L. Shaffer & Mary M. Shaffer, American Lawyers and Their
Communities: Ethics in the Legal Profession 5 (1991) ("It seems to have become
necessary, after Watergate, to separate the law on lawyers from legal ethics as ethics.
I will use this distinction and these two phrases as if they are thus separated: (i) the
law on lawyers, and (ii) legal ethics as ethics.").

67. For an example of one of the questionable features of legal ethics, see, for

On the basis of the ABA's ethical choices in its exceptions to lawyer-client
confidentiality in the Model Rules, the ABA's ethical profile is a grotesque
caricature. The ABA's most important value is preventing perjury (lawyer
required to disclose client confidences). Next in order of rank are defending
the lawyer against charges of wrongdoing, and collecting the lawyer's fee
(lawyer permitted to disclose, with no caveat). Next is saving human life
(lawyer permitted to disclose, but a caveat against doing it). Entirely off the
list of protected values are protecting third parties from fraud, and obeying
the law or court orders (no exception—disclosure forbidden). In addition,
we have seen at least one example of a disingenuous comment created for
the purpose of changing the meaning of a rule that had been adopted by a
substantial majority vote. We have also seen what is, at best, some ex-
tremely poor drafting of important rules and comments, and, at worst, addi-
tional efforts at disingenuous manipulation. It is not a flattering portrait.
Id.

68. For the self-interest argument, see, for example, Stephen Gillers, What We
Talked About when We Talked About Ethics: A Critical View of the Model Rules, 46
not have initiated or accomplished any of them." Although lawyers were influential in the reform of medical ethics, legal ethics remains the domain of insiders.

At times an outside perspective enhances moral judgment. Green identified the first essential element of religion's deep structure as "the moral point of view." \[70\] \["[T]his structure has its origin in a familiar paradox of the moral life: that self-denial and self-restraint are conditions of human happiness and self-fulfillment."\] An ethics of self-interest does not embody the "moral point of view." Nor can it pretend to be a standard of public reason. If legal ethics is deficient as an ethics, then religion and philosophy have a corrective role to play in the profession. They are "outsiders" to a professional ethics that has not had an outside presence. Philosophy has already challenged some of legal ethics' tenets. Religion may offer another "moral point of view." Perhaps religion's contribution is no different from the contributions of "secular" philosophy. At this stage, however, we cannot be sure of that conclusion. It is possible that a religious legal ethics would place more emphasis on "self-restraint" and "self-denial," would be more critical of materialism or compensation structures, and would be more cognizant of duties to third parties. \[72\]

The history of

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70. Green, supra note 56, at 3.

71. Id. at 4.

72. See Allegretti, The Lawyer's Calling, supra note 7, at 33 ("Charles Kammer has suggested that the concept of vocation can serve as a check upon the tendency of professionals to prefer their own self-interest to the larger good. Too often lawyers and other professionals are dominated by a small-minded concern for their own well-being."); Berman, supra note 3, at 219. The original purposes of the constitutional guarantee of freedom from government control was to help create a society in which political and legal values, on the one hand, and religious values, on the other hand, freely interact, so that law will not degenerate into legalism but will serve its fundamental goals of justice, mercy, and good faith, and religion will not degenerate into a private religiosity or pietism but will maintain its social responsibility.

Id.

I would define the Christian vocation of the lawyer—very briefly—as having three aspects. First, it has a pastoral aspect: Christian lawyers are called to be genuine counselors to their clients, that is, to devote themselves not only to the protection of their clients' financial interests but also to their total well-being, including their integrity and dignity as persons. . . . The Christian lawyer has not only a pastoral but also a prophetic vocation. Lawyers as prophets devote themselves to the cause of social justice and humanity . . . legal services for the poor, for racial equality, for protection of the environment, and for law reform generally. In addition to a pastoral and a prophetic vocation, Christian lawyers have what I would call a priestly vocation, that is, a calling to play a part as responsible leaders in their communities. . . . The claim upon a lawyer to think and act responsibly as a lawyer in helping to maintain unity within the society, resolve conflict, and allocate power—this, too, is a religious claim.
religious communities is surely different from that of philosophical associations. Both perspectives should be heard.

If law professors will allow religious ethics a voice in their profession, then religious ethics must rise to the occasion. It is not clear that religious ethics has the capacity to do so.\textsuperscript{73} Comparative religious ethics is a "nascent discipline"\textsuperscript{74} and religious ethics is not readily distinguishable from theological ethics or from the comparative philosophy of religion.\textsuperscript{75} Lawyers will need a study of religion that illuminates the systemic features of American law—such as the role of the lawyer, the adversary system, the lawyer-client relationship—as well as specific moral questions about, for example, confidentiality and conflicts. Religion scholars may not be very interested in these practical questions. Religious ethics might compare the legal profession to religious professionals,\textsuperscript{76} or examine the relationship of law to religion from a historical perspective. Often, however, with its cross-cultural, comparative, and historical focus, religious studies has remained descriptive and eschewed the normative, which is relegated to theology. For example, Sumner Twiss and Bruce Grelle compare the growth of "in-

\textsuperscript{Id. at 350-51.}

\textsuperscript{73} Tom Shaffer, who has tried for years to bring religious ethics to law, writes that:

The keepers of the mansion of academic religion do not keep out attorneys, but they do not pay much attention to them either. Those who earn their bread with religious ethics seem to admit that law might have something to do with religious ethics, and vice versa, but they prefer entertaining such a possibility outside the mansion. I find that many people in that mansion are very generous in helping me learn from them. However, they distrust the law itself somewhat, and distrust those who practice and teach law even more. When the keepers of the mansion take up a legal-ethics question among themselves, as they occasionally do, they are usually cynical about whether being righteous, in a religious sense, has anything to do with being an attorney. It may be fair to say that people in the mansion of academic religion are not very interested in the law. However, I suspect they are afraid of the law, rather than disinterested in it. Perhaps they are afraid that the worlds of power in which lawyers work will not be interested in them.

Shaffer, \textit{supra} note 5, at 395.


\textsuperscript{75} On the comparative philosophy of religion, see Lee H. Yearley, \textit{Mencius and Aquinas: Theories of Virtue and Conceptions of Courage} 1 (1990) ("Nevertheless, when we consider issues in the comparative philosophy of religions, most now agree about the truth of a deceptively simple idea: the religious expressions of human beings are neither all the same nor are they all different.").

\textsuperscript{76} For example, from a philosopher we have an interesting account of the ethics of organized religion. \textit{See} Margaret P. Battin, \textit{Ethics in the Sanctuary: Examining the Practices of Organized Religion} (1990) (noting that philosophers who do applied ethics had, to that point, ignored the religious professionals); \textit{see also} Karen Lebacqz, \textit{Professional Ethics: Power and Paradox} (1985) (exploring professional ethics for religious professionals).
terreligious dialogue” (in religious communities) with the development of (academic) comparative religious ethics. They observe:

On the one hand, we have an area of scholarly inquiry that, despite its sophisticated tools and methods, appears to lack a raison d’être convincing to those within and outside the field. On the other hand, we have a community of dialogue with an enormously persuasive rationale and mission that nonetheless tends to founder in its ability to mount convincing and nonparochial positions and arguments. This situation is aptly illustrated by both enterprises’ recent discussions of prospects for, respectively, a common morality (a subject of scholarly interest) and a global ethic (a subject of interreligious dialogue).77

Similarly, within the legal profession we have a growth in theological dialogue about the practical role of the lawyer, with little scholarly input from religious ethics. Concerning the discussion between interreligious dialogue and comparative religious ethics, Twiss and Grelle conclude: “Interreligious dialogue offers to comparative religious ethics a persuasive raison d’être, agenda of issues, and practical orientation. By the same token, comparative religious ethics offers to interreligious dialogue an arsenal of critical tools and methods that could enhance the sophistication and effectiveness of its practical work.”78 American “religious legal ethics” awaits such an integration of theological concern with critical rigor. If religious ethics has no resources to address legal questions, or if it can be descriptive only (leaving theological ethics to be normative), then perhaps it is “little more than an idle exercise.”79

VI. PRACTICAL APPLICATIONS?

Ethical questions force us to be not only descriptive, but normative, and also specific. And so I end rather than begin with a case study. I turn to confidentiality, a contested question in legal ethics, to observe the possible relevance of theology and religious studies to a lawyer’s work.

Let me construct a hypothetical law professor. I’ll make her Catholic, as I am Catholic. (This is one unresolved tension between theology and religious studies: How do religion scholars talk about religious traditions not their own? The premise of religious studies is that a religion professor does not have to be a committed member of a theological community; scholarship is her professional qualification.) She opposes the traditional norm that requires confidentiality even when an innocent life is at stake80 and conscientiously objects to it.

77. Twiss & Grelle, supra note 74, at 22.
78. Id. at 23.
79. Id. at 47.
80. This standard remains the law in California. Cal. Bus. & Prof. Code § 6068(e) (West 1990); see Fred C. Zacharias, Privilege and Confidentiality in California, 28 U.C.
She thinks that letting the innocent person die is a violation of the natural law, as interpreted by several popes in their encyclicals. She is also critical of the Catholic theology that holds a priest's duty of confidentiality to be absolute in the same circumstances. In her view, the natural law basis of the Catholic theological tradition prohibits such a standard, even if canon law or tradition states otherwise. Her client tells her that he plans to kill someone, and she reports the client to the authorities. Let us imagine that she is then disciplined for this action, but the publicity surrounding the penalty raises such a public uproar that the legislature changes the rules to include an imminent bodily harm exception. Our lawyer becomes a member of the drafting committee for the new rule and in discussing its rationale she appeals to the Bill of Rights and to American constitutional and common law traditions. After the new rule passes, however, some Catholic law professors and clergy announce that Catholicism in fact supports an absolute, exception-less rule of confidentiality, for lawyers and for clergy. They complain that our lawyer is a bad Catholic, unfaithful to the church's magisterium. Two years later, on a tour of the United States, the pope states that Catholic lawyers must disclose confidences whenever an innocent life is at stake; this teaching is mandated by the natural law and by God's law. The priest, however, must not disclose confidences to save an innocent human life. The priest represents God; the lawyer represents the client.

So we see some ways in which religion is relevant to the lawyer's work. A "theological" commitment leads one to conscientious objection, which may result in penalty and/or reform of the rule. The theologian should be prepared to accept the penalty, as it may be the penalty that provokes the reform. The lawyer may be wrong, how-

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81. The lawyer might not be disciplined for such conduct. See Monroe H. Freedman, The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be, 29 Loy. L.A. L. Rev. 1631 (1996).

Professors Geoffrey C. Hazard, Jr. and W. William Hodes argue that the lawyer in a life-or-death case could, under "moral compulsion," engage in "conscientious civil disobedience" against a rule imposing silence on the lawyer. Moreover, they, along with Professor Auerbach, recognize that "most bar authorities would probably share [the lawyer's] moral revulsion [against a rule forbidding disclosure to save life], and would elect not to press forward with a disciplinary charge, should one be filed by the client." Id. at 1634 (citing Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.6:304 (2d ed. supp. 1993)). Hazard and Hodes continue:

Still, to reveal would violate the literal language of Rule 1.6, and [the Lawyer] should be prepared to accept the consequences of doing what is morally right, if a charge is filed and if he cannot convince the disciplinary authority to read in a "moral compulsion" exception to the letter of Rule 1.6. The publicity arising from such a case might well lead to salutary changes in the law—a hallmark of conscientious civil disobedience.
ever, about the need for reform and so we do not grant her an exemp-
tion. In my hypothetical, the public has joined in criticism of the old
norm, probably for a wide variety of reasons. The new rule is formu-
lated in the common language of the American legal tradition, even
though it is inspired by a theological view, as well as consistent with
the central tenets of a major religion. Meanwhile, “co-religionists”
criticize the attorney on theological grounds, asking whether she has
in fact represented her tradition accurately.

This last point reminds us that we do not want a theological legal
ethics; theology is best debated and resolved among members of the
same tradition. The legal profession cannot resolve questions about
Judaism or Catholicism or any other religious tradition. We depend
on lawyers to employ the language of public reason. In my hypotheti-
cal, the lawyer did use public reason, by employing constitutional and
common law language. If the debate is contentious, however (as any
discussion of confidentiality is bound to be), then our lawyer may ap-
peal to her Catholicism in ways that support the ideal of public reason
itself. She should not tell other lawyers that the pope has ruled that
lawyers must disclose, nor should she explain her theology of voca-
tion, whether clerical or legal. She may say that Catholicism, with, for
example, its distinction between spiritual and temporal, leads her to
support a secular legal profession that is governed by standards that
all lawyers may reasonably be expected to endorse. Such discussion
can answer critics who will otherwise suspect that she is trying to im-
pose a theological view on other lawyers. Moreover, her commitment
to the profession may remind other lawyers of their professional
ideals.

What role for religious ethics? Religious ethics is not an appeal to
one’s own faith or an explanation of the demands of one’s own reli-
gious tradition. I do not know of a comparative religious ethics of
confidentiality (although all religions “condemn . . . the breaking of
solemn promises”). Yet “religious” writers have been very critical of

82. See Levinson, supra note 7; Pearce, supra note 12. In response to Levinson’s
two models of Jewish lawyering, Pearce suggested that Levinson include a sixth
model, the lawyer committed to Jewish values in the practice of law. Pearce, supra
note 12, at 1614. This model would include, for example, special attention to the
practice of civil rights law. Id. at 1617 & n.30. Levinson is uncomfortable with such a
model because it involves one in “a delineation of what count as specifically Jewish
values.” Levinson, supra note 7, at 1584.

83. See Green, supra note 56, at 11. Comparative religion teaches us that:
Whatever their specific teachings, religions agree on the basic rules of moral-
ity. All prohibit wanton killing or injury of other persons (although many
permit legitimate self-defense); all condemn deception and the breaking of
solemn promises. On the positive side, all require giving some minimum of
aid to those in need; all require reparation for wrongs committed; and all ask
some expression of gratitude for assistance received. So prevalent are these
rules across a variety of religious and cultural traditions that C. S. Lewis
once called them “platitudes” of practical reason.

Id.
lawyers’ confidentiality in the innocent life scenario.84 About this last point on innocent life, an early reader of this paper stated that religion may have no contribution different from that of philosophy, because philosophers also accept the innocent life exception, for similar reasons.

One response to that objection is that the profession will be well-served if religious and philosophical arguments converge on common ethical principles; so the addition of religious ethics should be uncontroversial. However, I am not yet ready to concede that religion’s contribution is exactly that of moral philosophy. The innocent-life exception is not the only ethical question about confidentiality. What of the old classic, the Lake Pleasant Bodies case, in which the principle of confidentiality is weighed, not against imminent bodily harm, but against the anguish of parents whose children are missing? The late Alan Donagan argued that the “Judaico-Christian tradition” supports disclosure of the location of the bodies.85 Sanford Levinson has argued that there is a division between Jewish law and American legal ethics on questions of confidentiality; the community interest takes precedence in Jewish law.86 Such a perspective at least suggests disclosure, not only in the innocent-life scenarios, but also in the location of the bodies situation. These perspectives disagree with the dominant philosophical account of exceptions to confidentiality in legal ethics.87

Many other religious views remain unnamed here. They might converge in their acceptance of the innocent-life exception or identify

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86. Levinson, supra note 7, at 1610 (“[S]hould this situation ever arise, it might well be analyzed as a true conflict of legal obligations, rather than as a more conventional conflict between law and morals.”). On Jewish law and confidentiality, see generally Rabbi Alfred S. Cohen, On Maintaining a Professional Confidence, 7 J. Halacha & Contemp. Soc’y 73, 76 (1984) (noting that the Bar amendment requiring lawyers to keep client secrets about financial fraud “is going to pose a great dilemma for an observant Jewish attorney who, for example, would be legally precluded from warning a friend not to buy a share in his client’s business [yet believes that] one must try to prevent harm from coming upon another Jew”), and Gordon Tucker, The Confidentiality Rule: A Philosophical Perspective with Reference to Jewish Law and Ethics, 13 Fordham Urb. L.J. 99, 100 (1985) (stating that, for a Jewish lawyer, “[a]n obligation to protect a dependent cannot override the general moral obligation to protect innocent human life”).

other limits to confidentiality, now unrecognized by the legal profession. They would probably not permit exceptions to confidentiality for lawyers' self-defense, while denying exceptions for the defense of innocent life. Philosophy alone may be adequate to reform the legal profession's odd confidentiality rules. Once an appeal to comprehensive doctrines is made, however, religious as well as philosophical comprehensive arguments should be considered. Appeals to theology might be valuable so that we learn of lawyers' commitment to public reason; religion may have a normative role to play. If comparative religious ethics is indeed

a hermeneutical, critical, and practical moral endeavor aimed at, respectively, (1) interpreting moral-religious cultural systems and patterns of reasoning in socio-historical context, including here both cross-cultural and intracultural diversity; (2) analyzing critically the social, political, economic, and institutional influences within and on these systems and patterns; and (3) identifying and developing intracultural and intercultural moral procedures and resources for constructing practical strategies for advancing human well-being.\(^{88}\)

then its goal is not the same as philosophical ethics. In its critical and practical tasks, comparative religious ethics might shed light on the confusion surrounding lawyers' confidentiality as well as other moral topics.

Enough of confidentiality. Turning to a controversial moral subject emphasizes that "dilemmatic" character of religious and theological legal ethics, the apparent conflicts between religion and legal ethics. I have argued that when the profession confronts moral dilemmas, both theology and religious studies have a role to play. Theology motivates individual lawyers and may inspire them to conscientiously object to the norms of the profession. Religious studies—if it is the discipline it claims to be—assists them in translating their theological convictions into norms of public reason. Professionalism, however, is much more than moral dilemmas. Religion and theology also have a place in the daily life of the profession. We should not underestimate or denigrate religion's role in encouraging individuals to be good lawyers. Religious as well as philosophical comprehensive doctrines that encourage people to be good lawyers are an important part of legal ethics. Such comprehensive doctrines need not be privatized.

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88. Twiss & Grelle, supra note 74, at 23.