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Negotiating Between Two Convictional Systems

Cover Page Footnote
B.A., U.C. Berkeley; J.D., UCLA School of Law; currently a doctoral candidate in history at the University of Texas at Austin specializing in medieval Islamic history and jurisprudence. I would like to thank Professor Khaled Abou El Fadl whose insights on legal ethics and Islamic law were extremely helpful, and whose article, Muslim Minorities and Self-Restraint in Liberal Democracies, 29 Loy. L.A. L. Rev. 1525 (1996), provided a conceptual framework for this paper. I am also grateful to Shahed Amanullah, William Kwong, Esq., and my wife, Naheed, for debating frustrating hypotheticals with me and reviewing earlier drafts. I would also like to thank my wife for the encouragement and support which made this paper possible.
NEGOTIATING BETWEEN TWO CONVICTIONAL SYSTEMS

Anver M. Emon

Leslie Griffin proposes that religious attorneys can in fact rely upon their theological beliefs to determine appropriate legal professional behavior. She argues that the use of moral philosophy as a discipline by which one can determine what is ethically appropriate in legal practice is no different from using a theological or religious approach. Consequently, to the extent moral philosophy is relevant for a discussion of legal ethics, so too is religion. Creating dichotomies between religious studies and theology, and the old “standard conception” and a “new standard conception” of legal ethics, Professor Griffin argues that religious beliefs can play a role in legal ethics similar to that of moral philosophy.

In this response, I address whether or how a religious attorney can negotiate his or her professional conduct in a manner consistent with his or her religious beliefs. I forgo, however, the dichotomies espoused by Professor Griffin and focus on the epistemological nature of both law and religion. Like religion, the existence of the legal system is premised upon certain ideas whose ultimate justification is little more than belief. Adherence to a secular law that is respectful of pluralism relies on certain conceptions of the person and of society which

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2. Professor Griffin differentiates between theological and religious approaches. Griffin, supra note 1, at 1253. This distinction will be addressed later. See infra notes 32-36 and accompanying text.

3. According to David Luban, the “standard conception” of the lawyer’s role consists of “(1) a role obligation . . . that identifies professionalism with extreme partisan zeal on behalf of the client and (2) the ‘principle of nonaccountability,’ which insists that the lawyer bears no moral responsibility for the client’s goals or the means used to attain them.” David Luban, Lawyers and Justice: An Ethical Study xx (1988); see also Griffin, supra note 1, at 1254 and accompanying text (discussing David Luban’s “standard conception”).

4. Professor Griffin offers the “new standard conception” as a means to distinguish between two methods of legal ethics. The first, or old “standard conception,” relies on legal ethical codes to inform proper attorney behavior. The second, the “new standard, philosophical view,” introduces the use of moral philosophy into the inquiry of legal ethics. See Griffin, supra note 1, at 1254.

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can only be justified in terms of conviction. Professor Griffin's argument incorporates this nature of the law by relying on John Rawls's idea of "public reason." I will show that if we adopt Rawls's "political liberalism" and "public reason," we immediately commit ourselves to a system of "belief" in which the law is an instrumental mechanism of stability and order. The law, with its legislative acts, common law decisions, and even legal ethical codes, constitutes the "dogma" and language of our "faith" as attorneys and citizens in a political liberalist society. Consequently, to argue that religious belief can play a role in legal decision-making in a political liberalist society essentially requires a reciprocal interaction between two "belief" systems on the "truth" value of a particular act or series of acts. Whether religion can be a part of an attorney's legal practice requires a negotiation between two convictional systems, namely his professional ethics and his religion, which are of equal moral value for the religious attorney.

In Political Liberalism, Rawls is concerned with how a society can maintain stability and order when its citizens adopt different and often divergent "comprehensive doctrines" of good and truth. In other words, "How is a just and free society possible under conditions of deep doctrinal conflict with no prospect of resolution?" Rawls's solution is to construct a political framework which does not address or judge the moral value of the views held by its citizenry. His society is a dualistic society which relegates matters of moral epistemology to the realm of private life, while placing matters of social and political organization in the realm of public life. Because Rawls's model of political and social organization—"political liberalism"—does not involve matters of morality, but rather is meant to allow different conceptions of morality to exist, "justice" becomes a political concept for Rawls that only addresses the most fundamental constitutional questions. Justice involves pragmatic and practical issues of social organization and control rather than questions of truth and meaning.

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5. Id. at 1263 n.23.
6. My use of "negotiation" goes beyond Professor Griffin's use of "translate." Id. at 1263. "Negotiation" connotes a reciprocal interaction between two equally valid and equally prioritized systems of thought, whereas Professor Griffin's "translate" seems to require only a one-way interaction where religious belief transforms itself into language familiar to that of law and "political liberalism." As I will argue, Professor Griffin's argument only reaffirms the public-private distinction which relegates religion outside the realm of public discourse (and therefore legal ethics), and seems to place her in the position from which she originally started.
8. Id. at xxx.
9. For Rawls, justice is principally a political idea whose primary function is to order and organize society. As an organizing tool, justice is not meant to have metaphysical import. Rather, it is a political conception which strives for fairness in society. "[J]ustice as fairness starts from within a certain political tradition and takes as its fundamental idea that of society as a fair system of cooperation over time, from one generation to the next." Id. at 14 (footnote omitted).
The comprehensive philosophical and moral views we are wont to use in debating fundamental political issues should give way in public life. Public reason—citizens' reasoning in the public forum about constitutional essentials and basic questions of justice—is now best guided by a political conception the principles and values of which all citizens can endorse. That political conception is to be, so to speak, political and not metaphysical.

"Political liberalism" and its companion concept "justice as fairness" exclude many issues of what a conception of justice held by a comprehensive doctrine such as moral philosophy or a religious tradition should include.

By narrowing the scope of questions and issues that "political liberalism's" conception of justice can address, Rawls not only allows for a pluralism of ideals and doctrines to exist, but he also attempts to insulate political discourse from any metaphysical tendency. At the beginning of Political Liberalism, Rawls argues that his idea of a "well-ordered society" in A Theory of Justice was "unrealistic."10 It was unrealistic because the theory of justice he proffered in A Theory of Justice regarded justice itself as a "comprehensive doctrine."11 His new idea of "political liberalism" is meant to avoid the criticism that it is a comprehensive or metaphysical doctrine. "Political liberalism" is supposed to be a "freestanding" conception of justice and public order which does not incorporate any "specific metaphysical or epistemological doctrine beyond what is implied by the political conception itself."12 By making "justice" political in nature, Rawls hopes to remove the metaphysical factors that plagued his earlier theory.13

And yet, as suggested above, "political liberalism" cannot escape the need for a metaphysical base that incorporates certain principles of social organization and political stability which make it possible for a pluralist society to exist and succeed.14 One of those principles is Rawls's dualistic society itself, which distinguishes between a public

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10. Id. at 10 (emphasis added) (internal cross-reference omitted).
11. Id. at xviii.
12. Id.
13. Id. at 10; see also Michael J. Sandel, Political Liberalism, 107 Harv. L. Rev. 1765, 1771 (1994) (book review) (summarizing Rawls's argument that his concept of political liberalism is political and not metaphysical or philosophical).
14. Sandel's review is a good source on the debates surrounding Rawls's Political Liberalism. In particular, Sandel mentions how a central debate regarding Rawls's theory "is not whether rights should be respected, but whether rights can be identified and justified in a way that does not presuppose any particular conception of the good." Sandel, supra note 13, at 1767.
15. Rawls admits that political liberalism includes epistemological aspects. See Rawls, supra note 7, at 62. He argues, however, that these aspects are secondary effects of a larger system of political organization whose primary task is to establish a pragmatic system of governance. The thesis of this paper is that despite Rawls's efforts to create a pragmatic system of organization, he cannot avoid using certain principles of organization which serve as underlying principles that make the entire venture possible. Although intended as incidental circumstances, the epistemological
and private realm of discourse. Although Rawls's dualistic society is the foundation of his theory of political liberalism, the dualistic society is also the basis of "political liberalism's" metaphysical nature. Essentially, Rawls leaves "aside how people's comprehensive doctrines connect with the content of the political conception of justice and regard that content as arising from the various fundamental ideas drawn from the public political culture of a democratic society." What Rawls does not admit, however, is that this conception of social and political organization presupposes that other comprehensive doctrines can relegate matters of politics outside the realm of morality and can adopt the underlying principle of "political liberalism," either as a shared understanding of humanity and social organization, or simply as a political matter outside their scope of application. Rawls's conception does not respect comprehensive doctrines, which cannot make this type of split. Because of this presupposition, "political liberalism" itself becomes a comprehensive doctrine which distinguishes between nature of these principles renders "political liberalism" vulnerable to being considered a comprehensive doctrine.

16. Id. at 25 n.27.
17. See generally Miriam Galston, Rawlsian Dualism and the Autonomy of Political Thought, 94 Colum. L. Rev. 1842, 1845 (1994) (suggesting the existence of a conflict between Rawls's political theories and some comprehensive theories). For example, Rawls argues that one of the fundamental principles of "political liberalism" is the "idea of citizens . . . as free and equal persons." Rawls, supra note 7, at 14. This idea is not altogether obvious from the perspective of all comprehensive doctrines. In Islamic law, for instance, Christians and Jews living within the jurisdiction of an Islamic government have historically been accorded a social status different from, and likely inferior to, their fellow Muslim residents.

Jews and Christians ruled by Muslims had the political status of dhimmis, being accorded toleration in return for submitting to Muslim rule and accepting a number of conditions governing their conduct. Dhimmis had to pay a special capitation tax known as the jizya and were excluded from serving in the military . . . . Depending on the jurists' opinions, dhimmis could be either excluded from serving in government altogether or excluded from high government positions.

Ann Elizabeth Mayer, Islam and Human Rights: Tradition and Politics 127 (2d ed. 1995) (footnote omitted); see also Abdur Rahman I. Doi, Shari'ah: The Islamic Law 426-36 (1984) (discussing aspects of Islamic legal discourses generally); Majid Khadduri, The Islamic Conception of Justice 163 (1984) (describing regulation of Muslim and non-Muslim relations). While it is not clear whether the use of dhimmi status is a transcendent principle required to implement an Islamic system of government in all times and places, its historical existence calls into question whether Islam could be a "reasonable comprehensive doctrine" within Rawls's political liberal vision of society. But see Abdullahi Ahmed An-Na'im, Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law 91 (1990) (suggesting that dhimmi status may not be a necessary element to an Islamic governmental system). Most importantly, though, it suggests that Rawls's fundamental principle of the equality and freedom of the individual is less a matter of political or empirical fact, and more a matter of belief.
good and bad, or in Rawls's terms "reasonable" and "unreasonable."

For example, in a Rawlsian pluralist society, certain comprehensive doctrines cannot be included in the political consensus reached in matters of fundamental constitutional concern. Rawls calls this consensus an "overlapping consensus"—overlapping because it contains the intersection of "reasonable comprehensive doctrines" over certain principles underlying the political liberalist venture. Comprehensive doctrines are reasonable only to the extent that they accept the political liberal ideals of justice. These ideals outweigh competing ideals proffered by other comprehensive doctrines. The values which "conflict with the political conception of justice and its sustaining virtues may be normally outweighed because they come into conflict with the very conditions that make fair social cooperation possible on a footing of mutual respect."

As a moral force, the political conception of justice determines what is reasonable and unreasonable. "Political liberalism" and its "sustaining values" are essentially metaphysical ideals which are actualized, in part, through the determination of certain

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18. Galston argues this point expressly. She states: [A] person's understanding of the relationship between his moral, religious, philosophic, or other comprehensive views and political values and objectives is itself an important part of the person's comprehensive views. As a consequence, Rawls's admission that his political theory may take a position on this question that conflicts with the counterpart understanding of this question contained in the person's comprehensive view reveals the existence of a more fundamental conflict between Rawls's political theory and some comprehensive theories than is apparent from his earlier assurances. Galston, supra note 17, at 1845. Sandel notes that some commentators do not agree with this position. "Some have read Rawls's recent writings as suggesting that justice as fairness, being a political conception of justice, requires no moral or philosophical justification apart from an appeal to the shared understandings implicit in our political culture." Sandel, supra note 13, at 1774. But see Abner S. Greene, Uncommon Ground, 62 Geo. Wash. L. Rev. 646, 649-50 (1994) (book review) (suggesting that "although Rawls claims to advance an argument sounding in political liberalism, his views are actually more consistent with the comprehensive liberalism that he claims to avoid").

19. See, e.g., Rawls, supra note 7, at 48-50 (defining reasonable people by their desire to cooperate with others on mutually agreeable terms).

20. For example, Rawls writes that his political conception of justice is the "focus of an overlapping consensus of at least the reasonable comprehensive doctrines affirmed by its citizens." Id. at 48.

21. Reasonable comprehensive doctrines can accommodate the language of political liberalism in the context of reciprocal relations between free and equal persons. And yet the language and requirements of political liberalism limit which comprehensive doctrines can reasonably be respected within a political liberal regime. [R]easonable persons see that the burdens of judgment set limits on what can be reasonably justified to others, and so they endorse some form of liberty of conscience and freedom of thought. It is unreasonable for us to use political power, should we possess it, or share it with others, to repress comprehensive views that are not unreasonable.

Id. at 61.

22. Id. at 157.
comprehensive doctrines as reasonable and others as unreasonable. Consequently, the "overlapping consensus" required in a pluralist society is more than simply a *modus vivendi* premised upon special group interests. It is a moral consensus of a political conception of justice that is itself moral. Rawls's theory of justice "is not merely a . . . pragmatic or superficial acceptance of the political community's values and goals. Rawls's theory requires that citizens believe in cooperation as a positive social good and not just as necessary to ensure their private pursuit of ends without fear or interference." If "political liberalism" is a comprehensive doctrine, then what is public reason if not the language and method of actualizing the principles of "political liberalism" in reality. Public reason becomes the vocabulary of the discourse concerning the overlapping consensus on issues of political relevance. In it are the "principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them." Public reason is "an intellectual and moral power" by which a political society puts its ends "in an order of priority" and makes its decisions accordingly. As a mechanism of communication and order, it is intimately tied to "the ideals and principles expressed by society's conception of political justice . . . ." The ideals of "political liberalism" require a system of thought, expression, and language. Public reason fulfills all of these necessary functions. "What public reason asks is that citizens be able to explain

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23. The nature of reasonability suggests that "political liberalism" incorporates certain metaphysical principles of social organization which vitiate its purely political nature. For example, Rawls suggests a definition of one such principle: "This organizing idea is that of society as a fair system of social cooperation between free and equal persons viewed as fully cooperating members of society over a complete life." *Id.* at 9. Such a principle provides "a publicly recognized point of view from which all citizens can examine before one another whether their political and social institutions are just." *Id.* The principles provide a public point of view from which the political conception of justice can be examined. But the standard of judgment is set already by the principles themselves. Justice is examined by a public political perspective which not only was established by certain principles, but also maintains and entrenches those principles in the hearts of the society's citizens. The construction of meaning and justice therefore assumes a certain circularity in its form.

24. *Id.* at 147.

25. *Galston, supra* note 17, at 1850 (footnotes omitted).

26. *See Sandel, supra* note 13, at 1789 ("Not only may government not endorse one or another conception of the good, but citizens may not even introduce into political discourse their comprehensive moral or religious convictions, at least when debating matters of justice and rights." (emphasis added)); *see also* Elizabeth H. Wolgast, *The Demands of Public Reason*, 94 Colum. L. Rev. 1936, 1937 (1994) ("Public reason concerns the citizens' public discussion of publicly important issues for the community.").


28. *Id.* at 212-13.

29. *Id.* at 213; *see also id.* at 223 (noting that public reason "is elaborated in terms of fundamental political ideas viewed as implicit in the public political culture of a democratic society").
their vote to one another in terms of a reasonable balance of public political values . . . ."\textsuperscript{30} Public reason sets the terms of debate in relation to the underlying principles of "political liberalism."

For lawyers, the language of our profession is part of the public reason of "political liberalism." Our discourse on matters of rights, constitutional values, and fair treatment of individuals as equal and free incorporates the principles of a pluralist democratic society. Consequently, the law is intimately involved in the convictional system of "political liberalism." It is one of the means by which the ideals and beliefs of "political liberalism" are actualized in reality in the form of rules, such as legislative acts, court cases, and ethical codes of conduct. These codifications of justice establish for lawyers the language of our profession and the guidelines of our behavior.\textsuperscript{31} In a sense, they are the "dogma" and "doctrine" of our faith as attorneys within a comprehensive doctrine of "political liberalism."

If the law is an instrument in a comprehensive doctrine of a political conception of justice, the religious lawyer is faced with negotiating a reality between two different convictional systems both of which he adopts. My idea of "negotiation" is analogous to, but significantly different from, Professor Griffin's use of "translate."\textsuperscript{32} For Professor Griffin, the religious attorney must "translate" his or her religious beliefs in a manner comprehensible and respected by the public reason of "political liberalism."\textsuperscript{33} This translation process, though, is a one way process, which seems to reaffirm the private nature of religion and the public nature of law inherent in the dualism of "political liberalism." It can be agreed that the religious attorney views his reality from two different perspectives—the professional and the religious. His behavior is necessarily composed of a complex reciprocal interac-

\textsuperscript{30} Id. at 243 (emphasis added).

\textsuperscript{31} This raises the question whether and how lawyers are different from other citizens of a pluralist, democratic society. In other words, are lawyers the only ones who can be members of a society steeped in respect for the equality and freedom of the individual? The obvious answer to this question is a resounding "no." The language of the legal profession only constitutes one type of language in the vocabulary of public reason. In the United States, for example, both lawyers and citizens take oaths of loyalty to the law. The difference is that lawyers are in a unique position to explain the rights and obligations to non-lawyer citizens. In a sense, they play a similar function as the *fuguhah* (lawyers) and *mujahids* (jurists) played in Islamic history. These functionaries informed Muslims of their duties under Islamic law and to the Divine Will. They were not part of a clergy; rather they were judges, law teachers, or legal professionals (in a loose sense) who guided individuals on their path to the Divine Will. See generally George Makdisi, The Rise of Colleges: Institutions of Learning in Islam and the West (1981) (discussing Islamic institutions of learning and the hierarchy of the Islamic legal "profession"). In a similar manner, lawyers guide citizens on a path toward experiencing their equality and freedom within a politically liberal society. In fact, it may be this very function which prompts Luban to remark: "[O]ur nation is so dependent on its lawyers that their ethical problems transform themselves into public difficulties." Luban, supra note 3, at xviii.

\textsuperscript{32} Griffin, supra note 1, at 1263.

\textsuperscript{33} Id.
tation between these two systems of "belief." To require him or her to translate one system into the terms of the other without requiring the reverse undermines the integrity of the first system as an equally valid epistemological system. The idea of a one-way translation reaffirms the exclusion of religion from public, and even legal, discourse. Furthermore, because "political liberalism" is a comprehensive doctrine enjoying a degree of power not experienced by other comprehensive doctrines, any translation of a comprehensive doctrine into terms familiar to "political liberalism" may threaten the integrity of the original doctrine. This is not to say that public discourse should make room for religious vocabulary and extensive religious symbolism; rather the norms and "dogma" of the legal profession must also be open to the possibility of being "translated" into terms familiar to the "public reason" of a religious system. This reciprocal translation is what I mean by "negotiate." "Negotiation" implies an equal relationship and respect for both systems of belief that the religious attorney adopts. It acknowledges the complexity of the religious attorney's character and personality, and enables him to determine his behavioral reality in a holistic fashion.

Consequently, I agree with Professor Griffin that where the attorney violates a legal obligation and opts to follow his religious duties instead, he should be treated by the legal system as a conscientious objector, as opposed to being exempted in a fashion analogous to exemptions under Free Exercise jurisprudence. As Professor Griffin

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34. Although the religious impetus may still exist once its terms have been translated into those of the law, the point is that the standard of judging the "reasonableness" of the religious assertion is invested in another system of thought. Religious belief is not given the opportunity to apply its language and public reason to the task of determining the appropriate ethical behavior of the religious attorney. By requiring a reciprocal translation, religious belief is given this opportunity and is acknowledged as equally valid in both the private and public realms of personal conduct.

35. The mechanism of any "negotiation" process is a complex matter beyond the scope of this paper. For purposes of this paper, the use of "negotiation" in contrast to "translate" is meant to carry psychological weight for the religious legal professional. "Translation," as a one way process, does not seem to respect the integrity of a religious system vis-à-vis political liberalism in the same way that "negotiation" does. Nevertheless, the concept of "negotiation" is the heart of any process a religious legal professional uses to reconcile his or her religious beliefs with the law and its ethical requirements. How this negotiation process occurs will likely differ depending on who is doing the negotiation and what the consequences are for the overlapping consensus implicit in any political system. An attorney facing an ethical-religious conflict will have a negotiation process quite different from a judge who faces a religious conflict concerning the legal outcome of a case. Both will engage in discourse between the two systems, subject to varying constraints imposed by the political philosophy of the prevailing system of law. What those constraints are and how they apply at different levels of the legal and political process is a subject requiring further necessary discussion.

36. For example, the freedom and equality of the individual implicit in a politically liberal society must be translated into terms that resonate with Islamic conceptions of the individual and society in order to overcome the historical precedent of the dhimmi institution.
notes, an exemption model excuses the religious believer from disciplinary proceedings; whereas, in a civil disobedience model, the penalty is not suspended.\textsuperscript{37} The civil disobedient attorney follows his beliefs and accepts the penalty imposed upon him by his respective bar’s disciplinary committee.\textsuperscript{38} Professor Griffin argues, and I think correctly so, that, if an exemption model were used, the legal profession would appear to grant greater importance to an attorney’s belief than the professional standards it sets forth.\textsuperscript{39} I would argue that the equality of both doctrines, which is implicit in the negotiation process, would be undermined under an exemption model. The attorney takes an oath to uphold the laws of the state(s) in which he or she practices, just as the attorney may have taken an oath in a particular religious tradition to follow its tenets and adhere to its religious rulings.\textsuperscript{40} To grant the religious attorney an excuse for following his religion and violating his profession’s ethical requirements denigrates the value of the legal system and the value of the attorney’s oath to it. By preserving the punitive element arising from an attorney’s disobedience, the law and its comprehensive doctrine is respected as a holistic doctrine. Therefore, where there is a conflict between an attorney’s professional and religious obligations, the attorney’s resolution will likely lead to punishment in one system of belief or the other. Whether the attorney wishes the sanction to occur in this life or the next is a matter of personal choice relating to moral attitude and accountability.\textsuperscript{41}

Professor Griffin goes beyond the case of the religious attorney who attempts to reconcile the law with his or her faith and inquires whether and how legal ethics can be informed by religious ethics.\textsuperscript{42}

\textsuperscript{37} Griffin, supra note 1, at 1259–60.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 1260–61.
\textsuperscript{40} The Muslim, for example, is generally considered a member of the Muslim ummah (community) once he or she states the Declaration of Faith, or shahadah: “There is no god but Allah and Muhammad is His Messenger.” Once the shahadah is recited, the individual obligates himself or herself to the dictates of the faith. In a similar fashion, when I took the attorney’s oath to be admitted to the State Bar of California, I swore to uphold the Constitution, the laws of the United States, and the laws of the State of California. How or why should these two oaths be different in quality and import from each other? Both invoke moral systems of ethical and social order. Both impose upon the oath-taker certain obligations and duties once the oath is taken. They serve the same function with their respective subject matter.

\textsuperscript{41} The private ethical problems of lawyers become public difficulties the more we, as a society, depend upon lawyers. Luban, supra note 3, at xviii. Consequently, the more we wish to allow different systems of belief to enter into the ethical equation, the more we open the door of public discourse to what are considered private matters of belief. Griffin’s argument opens the door only a crack, presumably, to restrain the attorney from infusing the public discourse with religious doctrines that may undermine the respect for pluralism inherent in “political liberalism” and the law. Alternatively, my position opens the door farther, on the assumption that the lawyer can be trusted to differentiate between his two systems of belief and respect their separateness.

\textsuperscript{42} Griffin, supra note 1, at 1275–76.
Her major concern is that the terms of the debate may not be equally accessible to all members of the profession. The use of theological terms unique to Islam, for example, may not appeal to Jewish, Catholic, or Buddhist attorneys. Once again, Professor Griffin requires a translation of religious belief into terms familiar to the public reason of "political liberalism." The religious lawyer must make his religious beliefs "fit" the requirements of legal practice; otherwise he must reconcile the conflict in favor of one system over the other, or possibly opt out of one system or the other.

For Professor Griffin, affecting legal ethics through the translation of religious beliefs into the vocabulary of public reason is best done by the secular humanist discipline of religious studies.\textsuperscript{43} Distinguishing religious studies from theology, she argues that, "[i]n the twentieth century, religious studies found its way in the 'secular academy,' while theology often remained in the seminaries."\textsuperscript{44} Theology presumes belief whereas religious studies considers belief largely irrelevant.\textsuperscript{45} Scholars of religion "have searched for a study of religion that does not presuppose faith or belief in God."\textsuperscript{46} To the extent religious studies is secular in nature, it shares common features with the law and is therefore in a better position to translate theological beliefs into public reason.

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 comprehensible, 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.\textsuperscript{47}

I disagree with Professor Griffin's argument in that I do not assume that the secular humanist endeavor of religious studies is neutral and non-committal; rather it is part of its own comprehensive doctrine. Like the law, religious studies does not necessarily adopt or establish a specific belief system. By its very existence, however, it connotes the establishment of the comprehensive doctrine of secular humanism that, like "political liberalism," creates a dualistic reality relegating matters of religion to the private realm and matters of law, or in this

\begin{itemize}
\item \textsuperscript{43} Griffin, supra note 1, at 1268.
\item \textsuperscript{44} Id. 1268–69.
\item \textsuperscript{45} It is unclear whether the belief Griffin refers to in this section is that of the believer being studied or the believer who studies his religion. The significance of this difference will be addressed below. See infra notes 54–56 and accompanying text.
\item \textsuperscript{46} Griffin, supra note 1, at 1269. Griffin also recognizes that not all religious scholars insist on this presupposition. Quoting Mircea Eliade, Griffin notes: "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. at 1270 n.48 (quoting Mircea Eliade, Patterns in Comparative Religion xiii (Rosemary Sheed trans., Meridian Books 1984)).
\item \textsuperscript{47} Griffin, supra note 1, at 1271–72.
\end{itemize}
case academics, to the public realm. In a secular humanist sense, religious belief is not understood "reductively as a psychologically or culturally determined belief in nonexistent realities, or explained away as an accident of biology, but is recognized as a fundamental human activity in which every society and individual symbolically interprets and engages the ultimate nature of being." Religious studies employs a materialist conception of reality which has little room for God or metaphysical notions of morality. And yet its materialist principle is what makes it part of a larger comprehensive doctrine, distinct from religious comprehensive doctrines. Like law, religious studies becomes part of the language of the public reason of secular humanism, just as the Shari'a is part of the "public reason" of Islam, or the Halakha is part of the "public reason" of the Jewish faith, or the

48. It is not clear whether this comprehensive doctrine might be "political liberalism" itself. To the extent that the law and religious studies presume a secular society, both seem to be a part of the same doctrine and employ similar vocabulary. Rawls is not entirely clear how his theory of "political liberalism" relates to secular humanist thought. He states:

Sometimes one hears reference made to the so-called Enlightenment project of finding a philosophical secular doctrine, one founded on reason and yet comprehensive.

... Whether there is or ever was such an Enlightenment project we need not consider; for in any case political liberalism, as I think of it, and justice as fairness as a form thereof, has no such ambitions.

Rawls, supra note 7, at xx. But if "political liberalism" is comprehensive, is it part of a larger secular-humanist tradition, or are the two different? Rawls does not discuss the matter because he asserts that "political liberalism" is not comprehensive. Therefore, we do not yet have an answer to this question.


50. For example, Machiavelli notes that religion is "essential for the maintenance of a civilized way of life." Niccolo Machiavelli, The Discourses, in Selected Political Writings 114 (David Wootton ed. & trans., Hackett Publishing Company, Inc. 1994). His concern with religion was not with its tenets or beliefs, but rather with its effects on the organization of society. Consequently, the study of religion is immersed within a materialist endeavor of understanding humanity and its process of change, rather than understanding the Will of God, as was the case with Middle Age writers such as St. Augustine in The City of God. St. Augustine, The City of God (F.R. Montgomery Hitchcock trans., The MacMillan Company 1943).


Canons are part of the "public reason" in the Catholic faith. All of these regulatory systems of behavior have their own language, terms, methods, and importantly, underlying metaphysical principles of morality, whether it be academic standards of excellence or God's word.

Once religious studies is understood to be part of a larger comprehensive secular doctrine, then how a religious convivial system can inform the law through religious studies is different from what Professor Griffin suggests, especially if we are concerned with responsibly negotiating between multiple convivial systems. Here I do not distinguish "religion" from "theology" as Professor Griffin does. Professor Griffin's dichotomy allows for academicians of one religious persuasion to comment upon issues of moral significance in another. In the book *Hagarism*, for example, the authors attempt to use non-Islamic sources to track the origins of the Islamic faith. What they propose is a reconstruction of a well-accepted historical account. The following quote, taken from the preface of the book, illustrates my concern when academicians in religious studies attempt to comment upon matters of a religion not their own.

In the first place, the account we have given of the origins of Islam is not one which any believing Muslim can accept: not because it in any way belittles the historical role of Muhammad, but because it presents him in a role quite different from that which he has taken

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54. Even if we adopt religious studies as the mechanism by which we inform the law and legal ethics of theological positions, it is not altogether clear what Professor Griffin means by "religious studies" or what religious studies includes. The first problem is with defining religious studies. A cursory review of religious studies programs across the country would reveal an unsystematic curriculum. For example, whether Islamic studies is present in a religious studies department, an Arabic department, or an Asian Studies department is not at all predictable, despite the fact that such a program addresses matters of Islamic theology. Second, even if we use religious studies as a method of translating theological beliefs into terms familiar to the law, the problem we will face is whether religious studies sufficiently includes diverse theological perspectives. Whether the theological perspective can enter the realm of secular humanist academia is often dependent upon whether certain religions are sufficiently empowered in society to be allowed into the university setting. Such inclusion may be possible for religions such as Christianity and Judaism; it is not uncommon to find rabbis and priests teaching courses on college campuses. But for other less empowered faiths, it is not clear whether they will be permitted into the realm of religious studies. Religious studies reflects the normal power structures of society. It has its own interests which often parallel dominant political views. Inherently defective as an objective mechanism of theological representation, religious studies cannot sufficiently ensure adequate and objective representation of diverse theological viewpoints.

55. Professor Griffin notes that there is an issue regarding whether religion scholars can comment on religious traditions not their own. Griffin, supra note 1, at 1277. Nevertheless, she allows for this to occur by relying on an inherently secular religious academic tradition which does not base legitimacy and moral accountability on one's religious beliefs.
While secular humanist academic standards may find little problem with this type of endeavor, what is the effect of this type of scholarship in light of Professor Griffin's proposal that religious studies be a mechanism by which religious belief can be translated into terms familiar to the law? If the same quote appeared in a work by a non-Muslim professor of Islamic law on a matter of legal and theological concern to Muslims, what would be the value of such research in terms of reconciling a Muslim attorney's religious and professional obligations? This problem arises because, in religious studies, not only does the belief of the believer being studied not matter, but neither does the belief of the one doing the research.

Under my theory, the legitimacy granted to a scholar of a religious tradition not his own should be diminished when he addresses matters in the realm of moral and ethical duty. If we assume that political liberalism, secular humanism, and religious belief constitute different comprehensive doctrines with their own language and requirements for their respective "public reasons," how can someone who does not adopt a particular comprehensive religious doctrine legitimately negotiate a reality between that faith and the law? The legal academician within the secular humanist tradition will use the terms and standards of his or her tradition, namely secular humanist religious studies, as opposed to the terms and standards of the faith in question to communicate with the legal tradition of "political liberalism." If this aspect of Professor Griffin's proposal incorporates a desire to ensure the moral accountability of legal practitioners, how can we allow scholars with one religious persuasion to provide what is essentially moral guidance to believers of another religion? How can we overlook the fact that a scholar who researches matters of moral and ethical duty within a comprehensive doctrine not his own cannot be held morally accountable with respect to the doctrine studied? It seems to be counterproductive to the idea of moral accountability to allow a religious studies academic to be a moral guide to a doctrine's followers when he is a foreigner to the doctrine itself.

This is not to say that religious scholars can never comment on religious traditions not their own. Rather, what I am saying is that such scholars cannot assume the same type of legitimacy in their scholarship when issues of morality and ethical duty are involved as a religious scholar who is also a believer of the faith he or she studies. For example, the principle academic resource in the legal profession is the law review. Is it surprising that most authors in law reviews across the

country are in some manner affiliated with the legal profession as either law students, law professors, practitioners, or judges? Where the law is part of a comprehensive doctrine, the ones who hold the greatest legitimacy for elaborating its principles and doctrines are the followers of the doctrine who can “speak” its “language.” If I want to understand the constitutionality of a particular tax provision, I will want to read an article by an attorney well versed in the fields of constitutional and tax law. I will not likely go to a certified public accountant or a moral philosopher. This is not to say that these professionals have nothing to contribute to the law; rather, their relevance is severely curtailed by their inexperience and lack of training in the law. My “beliefs” as an attorney are rooted in a system of thought that has a logic all its own.

Why should this be different for the religious scholar who tries to reconcile ethical duties between the law and a religious system? Where moral guidance is being addressed, how can we assume that someone who is not morally accountable to a particular religious comprehensive doctrine can legitimately negotiate between that system’s language and the language of the law? When it comes to matters of morality and belief, as well as negotiating an existence between competing systems of belief and loyalty, a greater amount of legitimacy should be granted to one who is himself morally accountable to the competing systems on which he comments.57

In conclusion, the means by which one negotiates between two ethical comprehensive doctrines will differ with respect to those doctrines and their respective vocabularies. Furthermore, whether a negotiation is possible will depend on the flexibility of each doctrine and the versatility of its mechanism of public reason. To determine the intricacies of how such a negotiation will take place is a matter beyond the scope of this paper. My principle purpose is to proffer the paradigm of “negotiation” over “translation” as a means by which a religious lawyer can holistically consider and determine his normative reality without subjugating any system of thought and belief to another. While, as attorneys, we live in a politically liberal society and adopt its norms and principles, many of us also adopt normative religious principles, which also govern our conduct. As religious attorneys, we have accepted both systems of thought into our life. We are equally obligated to both. Consequently, we must consciously and continuously

57. A consequence of my proposal is that anyone wishing to engage in academic debate about a conflict between a religious and legal obligation will essentially have to be an “adherent” of all three fields, namely law, religion, and the academic discipline of his choice—each of which is part of its own comprehensive doctrine. Consequently, the religious legal academician will be forced to negotiate a reality between the three doctrines he adopts. It is this negotiation which constitutes the basis of his legitimacy and accountability.
accommodate the needs of both systems while pushing each to their greatest flexibility in order to nourish the needs of the other.