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1982

## Moral Theology in Legal Ethics

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### Recommended Citation

Thomas L. Shaffer, *Moral Theology in Legal Ethics*, 12 Cap. U. L. Rev. 179 (1982-1983).

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## MORAL THEOLOGY IN LEGAL ETHICS

THOMAS L. SHAFFER\*

I am talking at a Lutheran university and therefore should probably have some theses, some propositions that I could nail to the chapel door. But I'm afraid I have failed Martin Luther: I have only one thesis and it is not ready for a nail. It is still as much a question as a thesis.

My question is whether there is any point in including moral theology in the study of legal ethics in the university. Let me be candid: I teach the typical required course in "professional responsibility," and I do a lot of writing on ethics, and I *do*, in my fumbling way, include moral theology in both enterprises. The reason I have this question to talk with you about is because I attract a bit of gentle astonishment for my approach to the subject, and I cause a certain amount of discomfort among my colleagues and students. I need a ringing intellectual reason for doing what I do. I doubt that Professor John E. Sullivan, for whom this lecture series is named, bothers with such misgivings when he teaches criminal law or torts; he has more self confidence than that, I am sure. And if Martin Luther had misgivings like mine he had so much style that his misgivings didn't show; he was not a tentative thinker.

So, in this Lutheran place, and with Luther's example before me, let me describe boldly what I'm talking about. Here is a modern, professional translation of a piece of scripture we have all nodded through in church (Luke 22:24-27):

A jealous dispute broke out among members of the Bar, over which of them should be president and which should be delegates to American Bar Association meetings in Hawaii, Montreal, and London. But he said, 'Among most of the lawyers you know . . . those who have authority are judges, senior partners, members of the board of governors of the state bar association, deans, and law professors. They are called "sir" by young lawyers [and—a few of them—"ma'am"]. This must not happen with you, though. No; the highest among you—even those who have been editors of the law review—even those who have gone to law school in New England—must behave as if he were the slowest, the least able, the most tongue-tied. The dean and the law professor must behave as if they were waitresses—

Here I pause to confirm the Greek. The word waitress is a relatively novel one. But the word St. Luke wrote is not the Greek transla-

tion for the Hebrew word we translate as "servant." It is a different Greek word, a Greek word that means one who waits on tables.<sup>1</sup> From this linguistic analysis, and from the context, I think the right translation is, "The dean and the law professor must behave as if they were waitresses." To continue with this translation:

"For who is greater? The one who has tenure, and a private office with his own secretary, and two research assistants, or the waitress? The one in the private office, surely. Yet here I am among you, a waitress." Here I am among you waiting on tables.

The logic of that section of Jesus' Sermon on the Plain, for the teacher of a legal-ethics class, in a modern law school, in America, may be as depressing as it was for those who first heard it. That is the way we Christians who teach legal ethics are to treat our students—as if they had sat down to dinner and we were bringing them their food, serving from the left and taking away from the right. It is also the way *they* are to treat *their clients*. That is the ethical logic of the teaching.<sup>2</sup> That logic is an example of what I am suggesting be put in the casebooks for the study of legal ethics in the university.

It is a novel metaphor. If you consult more traditional, domesticated religious metaphors in legal ethics you will often find the metaphor of the priest—meaning someone who has access to mysteries denied to other people. And the metaphor of the champion—meaning one who has strength and skill not possessed by other people, who will lay the cases of other people before God in trial by battle.<sup>3</sup> And the metaphor of the wise man—meaning one who sees reality more clearly than others. But you won't often find the metaphor of the waitress. A way to test the question of theology in legal ethics is whether the waitress metaphor belongs. Or, maybe, to say that it *has* to belong—considering the source of it—and to see if we can figure out what it means.

This bit of Scripture, is by the way, a Christian source, but the

\* Professor of Law, Washington and Lee University. This was the 1982 John E. Sullivan Lecture at Capital University School of Law, Columbus, Ohio.

1. I. MARSHALL, *THE GOSPEL OF LUKE* 810-14 (1978). Some of my advisors (see note 41 *infra*) balk at "waitress," but I have been stubborn about it. "Waiter" carries a certain connotation of haughtiness for those who go out to eat in modern America; "butler" won't do; "busboy" might.

2. Which is to argue that Jesus' example is a command. In St. Luke's telling of this story, the command is explicit—"This must not happen with you. No; the greatest among you must behave as if he were the youngest." *Luke* 22:26 (Jerusalem Bible). See Werpehowski, *Command and History in the Ethics of Karl Barth*, 9 JOURNAL OF RELIGIOUS ETHICS 298 (1981).

3. T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 107-109 (1981)(hereinafter cited as O.B.C.L.); Shaffer, *Negotiation Ethics: A Report to Cartaphila*, LITIGATION 37 (Winter 1981).

metaphor is a Jewish metaphor. It is Christian because it was Jewish; the substance of Jesus' ethics was Jewish.<sup>4</sup> The Jewish tradition even extends the metaphor—as Jesus did, too—to *enemies*. In interpreting Proverbs (25:21-22), which says,

If your enemy is hungry, give him bread to eat; if he is thirsty,  
give him water to drink; so you will heap coals on his head, and  
the Lord will reward you,

Rabbi Hanina bar Hama said: "Even if the enemy come to your house to slay you, and he is hungry or thirsty, give him food to drink; for thereby God will reconcile him to you."<sup>5</sup>

In fact, if you examine closely Jesus' appropriation of the Hebrew notion of servanthood—if you examine it, say, in reference to the songs of the suffering servant in the book of the prophet Isaiah—you will find even more depressing images than waiting on tables: You will find the claim that evil in the world is overcome by suffering, that the waitress should expect no reward for her humble service to others, but should expect pain. The method by which the God of Israel and of the Cross proposes to deal with His children is to summon them to be waitresses, and to suffer both in their being waitresses and as a consequence of their being waitresses. Through this suffering He will overcome evil in the world.<sup>6</sup> No wonder, as St. Teresa of Avila once remarked, that He has so few friends. And no wonder that we law teachers have been diffident about using such ethical material. As a matter of historical, social fact this religious view of ethics is peculiar, and even among Jews and Christians it is rarely mentioned as a useful source for ethics.

Teachers and practitioners of American legal ethics have ignored this and other sorts of religious thinking, in any case—almost rigorously so since the Civil War. The dominant tension in American legal ethics for more than a century has had nothing to do with the unprofessional humility of Isaiah or with waitresses. It has been, rather, a tension between two images of what an American lawyer is—the image of the gentleman and the image of the mercenary. Thomas Jefferson on one side; Wyatt Earp on the other. Someone played by E.G. Marshall on television versus someone played by Peter Falk. One of those images, the gentleman, takes responsibility for everything, and, in the Gospel phrase (conventionally translated), is called Benefactor.<sup>7</sup> The other, the

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4. R. SCHNACKENBERG, *THE MORAL TEACHING OF THE NEW TESTAMENT* (1965).

5. S. COHON, *JUDAISM: A WAY OF LIFE* 214 (1948).

6. T. Shaffer, *The Legal Ethics of Servanthood*, in *VIII SOCIAL RESPONSIBILITY, JOURNALISM, LAW, MEDICINE* (L. Hodges, ed., 1982).

7. See T. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT L. REV. 181 (1981); S. LETWIN, *THE GENTLEMAN IN TROLLOPE: INDIVIDUALITY AND MORAL INTEGRITY* 74-105 (1982).

mercenary, takes responsibility for nothing; he claims no responsibility for justice as Hebrew Scripture uses that word, but claims only to serve the state. He depends on the state to provide justice.<sup>8</sup>

From a theological perspective, both of these American lawyer images are idolatrous; both of them make a god of the government. Let me show you what I mean with a parable. In 1976, *The American Bar Association Journal* twice referred to a subject of some interest as "The Issue of the Decade."<sup>9</sup> Now, think for a moment about the 1970's and what happened in those ten years: The decade began with Americans bombing Cambodia. It ended with American hostages imprisoned in a compound in Iran. Between that beginning and that end there was turmoil between the races, turmoil between the generations, turmoil between the so-called first world and the so-called third world. There was, in the world of American lawyers, "Watergate" and the impeachment of a president. But do you know what the "Issue of the Decade" was to our nationally organized Bar? It was *advertising by lawyers*. That's what I mean by idolatry.

The theological claim is that such an issue evidences idolatry. Theology, by comparison, and *most* fundamentally, says that only God is God. And God is Father. He loves us; we are His children. One of the Hassidic rabbis whom Martin Buber quotes and loves said, "The greatest evil"—the *greatest* evil—"is when you forget that you are the son of a king."<sup>10</sup> God the Father is a loving God and the Ruler of the Universe.

Loving Fatherhood is significant for ethics, once you let theology into the room, because, for one thing, it says we need not fear being wrong. Rabbi Nahum of Rishyn once entered his house of study to find that all of his students were playing checkers instead of studying. The students were embarrassed. "Do you know the *rules* of checkers?" the rabbi asked. And the students were too humiliated to answer. The rabbi said, "I will tell you the rules of the game of checkers. The first is that one must not make two moves at once. The second is that one may only move forward, not backward. And the third is that when one has reached the last row, one may move wherever he likes."<sup>11</sup> That sounds like Martin Luther, doesn't it? Reverend Frank H. Fitch, the Lutheran pastor in my town, said in his Reformation Sunday sermon this year that the ethical question is, "Now that we know we don't *have* to do anything, what shall we do?"

The other thing that the introduction of the loving Father into legal ethics means—and this is even more radical—is that we need not

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8. See O.B.C.L., *supra* note 3, at 45-104.

9. 62 A.B.A.J. 735, 892-93 (1976).

10. M. BUBER, *HASIDISM AND MODERN MAN* 113 (M. Friedman trans. 1958).

11. *Id.* at 150-151.

fear being *right*. We need not fear the truth; we can bear the truth—even the truth of the Cross, even the truth of the story of Israel in the 20th century.

We can now begin to imagine how this Hebraic view of ethics, and the implications of it on our being wrong and being right, might affect discussion of the commodities of our trade:

The problem of representing the enemy of society, the dangerous and guilty criminal, the polluter, the Mafia don, might have to be seen as if such a cruddy person were to be served as a waitress serves people at tables. That is what the lawyer as a provider of legal services might be.<sup>12</sup>

The perjurious client—the litigant who wants to lie in court and wants his lawyer to help him—must now be approached as one who is a child of God, who is, in Justice Wilson's phrase, the noblest work of God—nobler, more important than the state itself! That phrase, by the way, is not from the Bible. It's from *Chisholm v. Georgia*.<sup>13</sup>

The problem of confidentiality, of keeping our clients' secrets, has to be analyzed in terms of fidelity, of trust, and not in terms either of the rivalrous sports-team loyalty of the locker room, or of the civilly functional notion of loyalty that we find in the *Code of Professional Responsibility*. We keep our clients' secrets not because our discretion serves the profession and therefore the state, but because our clients require our faithfulness. In a phrase, we are free to love our clients.<sup>14</sup>

You can no doubt expand the list of examples. Any time we run short we can trot out the stories of the saints and replenish our collection. We won't be looking at lawyers much, though, if we do that; we will be looking at beggars and fanatics and martyrs—at people who were, by and large, happy, but who suffered a lot, and who thought that their suffering was significant.<sup>15</sup>

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That sort of moral material is, I think, what is at issue in the question about moral theology in legal ethics. Otherwise I think the issue is trivial. Perhaps I am, in this, being hyperbolic, but even my being hyperbolic in description of the issue hasn't answered the question.

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12. O.B.C.L. at 45-104.

13. 2 Dallas (2 U.S.) 419, 462-463 (1793).

14. Perga, *Pro Se*, THE STUDENT LAWYER December 1982, 54; See 54 O.B.C.L., *supra* note 3, at 35-44.

15. S. HAUERWAS, TRUTHFULNESS AND TRAGEDY (1977).

The issue of whether this religious material belongs in a university's consideration of the professional ethics of American lawyers—that issue remains.

I need to linger over a point here and make sure that it is clear: I do not argue that moral theology is useful in legal ethics because it adds support from religious traditions for moral positions that are otherwise and conventionally established. I don't argue that we should invoke Scripture as an argument against telling lies or stealing. I don't argue that Scripture is useful on such questions, even in the derivative, subtle quandaries we have to consider in legal ethics—such as a criminal defendant's so-called right to testify falsely, or the point at which lawyers' fees become excessive and therefore an unjust taking of their clients' money. The morality that might usefully come to our subject from theology is not a morality of principles or rules; we have enough of those without theology. I am talking about the morality that turns on a way of life such as that suggested to Jews and Christians by the prophet Isaiah and by Jesus' Sermon on the Plain. It is not just that those moral teachings are radical; it is also that they are different, and in their difference they give legal ethics a place to come from.<sup>16</sup>

If I approach the issue of moral theology in legal ethics as a response to its occurrence in my own work, I will consider it, as Thomas Aquinas might have, in terms of objections. The objection I find most frequently—usually delivered, orally, with a squint and a squirm—is that moral theology is not *appropriate* in legal ethics. It doesn't *belong*. That objection is not precise; it needs restatement; but, as a matter of history, of what has been in legal ethics as it has been studied in the university in America, it may be an argument against my tentative, unnailed thesis. Propounders of legal ethics have not, as a matter of fact, done much with theology. The subject has developed as if Walter Rauschenbush and Paul Tillich and the Niebuhrs had not existed:

The founder of American legal ethics, a Baltimore lawyer named David Hoffman (d. 1854), was a careful and even formidable Bible scholar. He devoted a section of his program of legal education to the Bible<sup>17</sup>—but not as *ethics*. When he turned to ethics,<sup>18</sup> he did not invoke theology; he did not use Scripture.

The principal source of our modern codes of legal ethics, the

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16. T. Shaffer, *Christian Lawyer Stories and American Legal Ethics*, 33 MERCER L. REVIEW 877 (1982).

17. I. D. HOFFMAN, A COURSE OF LEGAL STUDY 64-81 (2d ed. 1836). A shorter version appears in his 1817 first edition. See Shaffer, *David Hoffman on the Bible As a Law Book*, CHRISTIAN LEGAL SOCIETY QUARTERLY, 5 (Fall 1981).

18. *Id.*, vol. II, tit. XIII, *Professional Deportment*.

essay on legal ethics<sup>19</sup> of Judge George Sharswood, Chief Justice of Pennsylvania and founder of the law school at the University of Pennsylvania, who was also a Sunday School teacher, considered what Sharswood called "the high and pure morality that breathes through the Sermon on the Mount"; but Sharswood concluded that such a morality wasn't ultimately helpful in the courtroom life of a lawyer, and not likely to be persuasive in the law office. Clients, among them the nascent American robber barons of Sharswood's generation, were too robust for such stuff.

The early intellectual movements in legal ethics paralleled the most energetic days of the Revival, but I have not been able to find much influence from one movement to the other. No doubt lawyers went to revival meetings; some few may even have been converted there; but they didn't talk about the effect of their religious zeal on their professional practices. At least one of them, Charles Grandison Finney, left his law practice and became first a preacher and then the founder of Oberlin College. His sermons are still available; they are precise and lawyerlike—remarkably so—and they contain a ringing social ethic, but I cannot find that Finney paid any particular attention to his former brethren at the Bar, nor they to him.<sup>20</sup>

This history may be saying to me that there is something ominous in the use of moral theology in legal ethics, that my forebearers knew what they were doing when they left it out. The past is not dead, as Faulkner said; it is not even past. But history does not respond to or support the charge that the use of moral theology in legal ethics is *inappropriate*. The dangerous argument may be the most appropriate of all, as we know from stories such as the one about the emperor's new clothes. We have to go back to that charge and see, in some other way, if we can figure out what that charge means.

It might mean that the use of theology in such a manifestly secular enterprise is uncivil. It makes people uncomfortable; it is not gentlemanly. It may mean—and this is something else—that the use of theology in legal ethics is not relevant: it doesn't have anything to do with the object of the study of legal ethics. It doesn't *matter*.<sup>21</sup> The

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19. Sharswood, *An Essay on Professional Ethics*, 32 REPORTS OF THE AMERICAN BAR ASS'N (1907). This version is the fifth edition (1884); the essay was first given as a lecture in 1854.

20. V. EDMAN, *FINNEY LIVES ON* (1951). This biography and *GREAT GOSPEL SERMONS* (2 vols. 1949) contain some of Finney's sermons.

21. Professor L. Ray Patterson, who argues that the study of legal ethics should



charge of inappropriateness may mean other things but I will pause over these two objections and leave to further discussion with you the possibility and analysis of others:

Let's consider *relevance* first. My claims here are (a) that theology is a useful—and traditional—discipline in moral science, and (b) that law is a moral science. We old-fashioned, pre-postivist natural lawyers would say, with Blackstone and most 19th century Americans, that *all* law school discussion depends on the first principle of ethics: Do good and avoid evil.<sup>22</sup> That is evident in almost any modern law school class.<sup>23</sup> Students and teachers regularly argue there about what is right, what is good, what is just—and whether it is enough that a particular legal rule be expedient or efficient. (They usually decide, in my observation, that it is not enough.) And all law-school argument is in significant part what ethics scholars call "pre-critical"; that is, its appeal is to common sense.<sup>24</sup> Ethical argument in law school assumes the same first principle and is to the same extent pre-critical.

What I am doing is trying to place the relevant substance of moral theology. I am claiming that this issue about relevance is part of a broader issue involving the relevance of ethics, as such, in legal education, which broader issue is part of the whole enterprise of discussing the *ought*, as well as the *is*, when we talk about law. I am claiming—but I need not, at the moment, press this—that my colleagues who leave philosophical and theological ethics out of what they teach are leaving out much of their own subject, as *they*, not I, define and practice it.<sup>25</sup> This argument is to claim for ethics, and then for theological ethics, that the part is as relevant as the whole.

The other half of the objection to this theological interest of mine, as it relates both to scholarship and to teaching, is that theology is an *uncivil* addition to legal ethics as an academic enterprise. I am particularly concerned about this issue in a university activity that includes or interests students, faculty and friends of all of the usual American points of view on religion. (I leave aside here the somewhat different questions of discussing religious ethics confessionally in voluntary groups of law school believers, or in law schools that claim special intellectual allegiance to a religious point of view.)

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be a legal subject primarily, does not *say* this, but he seems to me to imply it. L. Patterson, *On Teaching Legal Ethics*, The Matthew Bender Law School Report, Fall 1982; L. PATTERSON, LEGAL ETHICS 1-1 to 1-7 (1982). I mean to argue with him in this lecture and in *The Professional Responsibility of Teachers of Professional Responsibility*, \_\_\_\_ U. BALT. L. REV. \_\_\_\_ (1983). O.B.C.L., *supra* note 3, at 165-76.

22. See O.B.C.L., *supra* note 3, at 165-76.

23. T. SHAFFER AND R. REDMOUNT, LAWYERS, LAW STUDENTS, AND PEOPLE 153-229 (1977).

24. Hill, *Christian Moral Education*, 9 JOURNAL OF RELIGIOUS ETHICS 103 (1981).

25. R. RODES, THE LEGAL ENTERPRISE (1976).

Perhaps the charge of incivility accuses me, as Professor Ray Patterson recently put it, of turning the law-school classroom into a pulpit.<sup>26</sup> Perhaps I am accused of using homiletic *methods*. If so, I deny the charge. The study of moral theology is not, in theory or in practice, homiletic. My lectures on the subject of legal ethics are, I think, more clearly vulnerable to reason and persuasion than my and my colleagues' lectures on federal taxation. I try hard to make them so. The beginning of my effort is to teach legal ethics as ethics. I define ethics as thinking about morals, in about the same way most of us law teachers would say that university legal education is thinking about law. My aim in a law-school ethics course is that moral questions having to do with an American lawyer's life should be discussed as legal questions are discussed, in the sense that they should become the stuff of law-school *argument*—not doctrine, but argument. More can be said about the nature of such ethical argument as, specifically, argument involving good and evil, but it seems to me that consideration of good and evil in this instance need not, on the question of appropriateness in legal education, be more or less civil than consideration of good and evil in other university legal subjects. There is lots of evil in the Internal Revenue Code; tax teachers are not reluctant to point it out, sometimes with remarkable incivility. I claim that it is not uncivil to argue about oughts, not in professional responsibility any more than in federal taxation.

Perhaps the charge of incivility is that arguing about oughts, from a religious perspective, is intrusive. There is something to this point: Ethical argument is what non-legal scholars call "bi-polar."<sup>27</sup> Ethics works on us in two ways—as, I think, harmonic music does. In the music one hears there is melody and there is harmony. In the ethical argument there is a sound that is intellectual and there is a sound that is affective. Ethics should always admit that it talks about what one ought to do. It has to make its claim to a legitimate place in the university without denying that it proposes to make a difference to the people who are in the university. It has to admit that it is personally significant learning in a way that the law of taxation is not.

This bi-polarity causes ethics to claim a special methodology, as argument. The resolution of a discussion in ethics is neither a matter of *taste* nor a matter of *authority*. Take the question: Should the criminal defense lawyer assist in his client's perjury? That question is a question capable of argument, as is the related legal question of the client's constitutional right to testify falsely. The one is as fully capable of argument as the other, but the ethical question is different,

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26. See L. Patterson, *supra* note 21.

27. See Hill, *supra* note 24.

first, in that it does not yield to authority. That a judge or judges *decide* the constitutional question tends to *settle* it for purely legal purposes; in law, the decision and its implication of coercion make a significant difference. Decided questions tend to disappear from our casebooks. I claim that this is not true of the ethical question. David Hoffman argued (in 1836) that a lawyer should not defend a client in a contracts case if the client's only defense was the statute of limitations.<sup>28</sup> If that position is a quaint one now it is not because authority has made it quaint but because morally significant changes have taken place in the profession since Hoffman's day. It is possible that Hoffman was (is) right. The question is not settled. Lawyers and clients still ponder the question, and many of them no doubt decide it as Hoffman did.

Suppose the ethical argument is made: You should assist in your client's perjury because if you don't you'll get into trouble. The ethical question is not necessarily affected by the prospect of trouble. The legal question may be; in routine law-office law, it usually is. It is more possible in ethical argument than in a law-office argument to answer: Trouble? So what? It is possible at least to look at the argument "You'll get into trouble" in a different way, to argue that morality may *require* getting into trouble (as it did for Moses, Socrates, Jesus, Martin Luther King, Jr., and Mohandas Gandhi).<sup>29</sup> To point to coercive authority in ethics is not dispositive. In fact, the possibility of force raises new ethical questions. And therefore the intellectual tradition in ethics tends to say that the argument from authority is the weakest of all arguments. The state does not decide ethical questions, and neither the state nor the guru settles them.

Which is not to say that there is, in ethics, no tribunal for the resolution of disputes. The academic enterprise has always depended on the mind of the participant as the tribunal in both philosophy and theology, and therefore in ethics. If the mind is not the tribunal, ethics is not appropriate in the university. But that claim with regard to ethical argument in law school makes a special case, because ethics lacks coercion. The tribunal for the resolution of ethical disputes rests its jurisdiction on insight and persuasion, not on authority.

But if ethical argument is not resolved with authority, is it not merely a matter of taste? And is it not therefore uncivil to press people on ethical issues, and especially uncivil to mention religion when I do it? My student says she would not help her client lie in court. She says,

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28. D. Hoffman, *supra* note 18.

29. J. YODER, *THE POLITICS OF JESUS* (1972) is a careful development of this argument.

"That's just the way I *feel*. I suppose it has to do with my having gone to a Southern Baptist Sunday School." That is either where ethical argument *begins* or my question and her answer have no place in the university. Ethical argument is not resolved in taste, any more than it is resolved in authority. My student and I have brought into consideration a process we academics usually trace at least as far back as Socrates. For *starters* we have done that. And for starters it is consistent with our academic tradition to inquire wherein the values she brought with her to law school bear on our professional agenda. That's for starters—and my point is that the issue of the appropriateness of moral theology is answered for starters by establishing that ethical inquiry is not uncivil in *legal* ethics, because ethics is not a matter of taste. I am only doing what Socrates did with Crito and Thrasyarchus.

This student and I have also brought into consideration another process, a religious process, that we academics elsewhere trace at least as far back as Moses and the burning bush. It may be claimed that the Socratic part of her assertion is legitimate in class and the Mosaic part is not. Notice that this student claimed not only the barest suggestion of an intellectual position or two, but she also claimed a *culture*. We need to pause for a moment over the culture. That's where the Mosaic part is. Her culture is more Mosaic than Socratic. I claim that there is an inevitable cultural substance in moral discussion in law school. The fact that we notice a moral question and argue about it is the product of our culture.<sup>30</sup> Something deep tells this young woman not to lie, even as a lawyer, and that something is at least, and always, cultural. We might not otherwise have a moral issue to talk about. Or, if we had a cultureless moral issue—posed hypothetically, as if we were arguing about the revival of the levirate in modern America—it would not have the energy for us that this issue about truth-telling has. The explanation for the energy is culture.

Anytime you are talking to me about the implications of my choice to be a good lawyer, or a good American, the agenda is a cultural one. If part of the agenda is left out of our discussion, as would be the case if the university or my colleagues or my students made me leave out the fact that this student was reared in a Baptist Sunday School, then our discussion is a cultural amputee. Our leaving the Sunday School culture out of account does not mean it is not there. If it is uncivil to talk about culture in discussions of ethics in law school we will have to

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30. Shaffer, *supra* note 16, which depends heavily on HAUERWAS, *supra* note 15; S. HAUERWAS, *VISION AND VIRTUE* (1974), and *CHARACTER AND THE CHRISTIAN LIFE* (1975); and J. MCCLENDON, *BIOGRAPHY AS THEOLOGY* (1974). A valuable philosophical argument of somewhat the same sort is I. MURDOCH, *THE SOVEREIGNTY OF GOOD* (1970).

leave out the country lawyers,<sup>31</sup> the police-court lawyers,<sup>32</sup> Mr. Tutt,<sup>33</sup> and the gentlemen-lawyers<sup>34</sup> who gave us American legal ethics in the first place.

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The facts that ethical argument in the university is not a matter of taste, and not a matter of authority, and that ethical argument has personal significance in a way that legal argument does not, are what raise the question I came here to talk about—the question of moral theology in legal ethics. I claim at least that ethical argument in law school should aim to establish its jurisdiction and its tribunal carefully, so as not to overlook the personal importance of the substance of its business. The risk that personal importance will be left out of professional ethics is an acute risk for us American lawyers, because we have somehow, and for a *long* time, come to believe that it is impolite and intrusive to talk as if moral convictions matter—and to argue well about moral convictions is to treat them as if they matter. It is important, because of the cultural issue, and because of this fashionable disdain for serious moral argument,<sup>35</sup> to cast the discussion broadly and deeply.

This is, I suppose, how the charge of incivility comes in. Talking about morals in a way that includes culture, and especially religious culture, makes some people uncomfortable. But it may be that the test of effectiveness here is discomfort. At least it does not, I think, discredit a line of argument to show that it makes people uncomfortable. Discomfort is not a reason to abandon discussion—especially in ethics—because moral discussion is bound to be personal, and therefore may be uncomfortable. It may be that ethical discussion is useful only when it is uncomfortable. If you will let me bootstrap a bit here, that would be the lesson of the prophets—the lesson of Nathan, who leads King David to the point where David condemns the rich man who took the poor man's ewe, and then says to King David: "*You are the man!*"<sup>36</sup>

The restraint that says moral convictions do not matter is deep in American university legal education, though. I believe it has been profoundly corrupting. In any case I am going to claim that such a re-

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31. See Shaffer, *supra* note 7; O.B.C.L., *supra* note 3, at 143-52.

32. E.g., G. HIGGINS, KENNEDY FOR THE DEFENSE (1980); see M. NOVAK, IN PRAISE OF CYNICISM (1975).

33. The Mr. Tutt stories were published in magazines, mostly in *The Saturday Evening Post*, beginning in 1919 and ending during World War II.

34. See Shaffer, *Henry Knox and the Moral Theology of Law Firms*, 38 WASH & LEE L. REV. 347 (1981).

35. Schwartz, *The Death and Regeneration of Ethics*, 1980 AMERICAN BAR FOUNDATION RESEARCH JOURNAL 953.

36. 2 Samuel 12; O.B.C.L., *supra* note 3, at 111-120.

straint—the restraint that says moral convictions are irrelevant or that it is uncivil to argue about them—is fatuous. Which is not to say that even pre-critical ethical discussion does not operate without restraint. Ethical discussion, like any discourse in the university, is routinely subject to the restraint of intellectual discipline, and peculiarly subject to the restraint of compassion.

What I mean by intellectual discipline is that moral theology is acceptable in legal ethics to the extent that it can be and is subjected to disciplined argument on the premises of the claim being made. That is as much the case with “Jesus commanded his followers to be waitresses” as it is with, “The fourteenth amendment incorporates the Bill of Rights.” In either case one interesting question is whether the claim is valid and the other is what the claim means. One question is, “*Did* Jesus say *that*?” and the other is “What in the world did he mean?” Both questions assume that the views of Jesus are relevant, but it seems to me only common sense, in our culture, with our culture’s history, to say that the views of Jesus are as relevant as the views of Professor Monroe Freedman or Chief Justice Warren Burger—and I am confident that those two gentlemen would agree. It is not irrelevant to talk about the ethics of Jesus, but our talking about them in the university is subject to debate on the validity and the implications of the argument being made with reference to the ethics of Jesus.

It is not an argument against this sort of law school discussion that some people are made uncomfortable by it, but it should be noticed that they are made uncomfortable. The noticing of discomfort is what I mean by the restraint of compassion. But even before you reach compassion you may want to ask whether the discomfort is any less educational in an ethics class than it is in Professor Kingsfield’s contracts class—where, as he says, he takes people with heads full of mush and turns them out thinking like lawyers. Perhaps we ethics teachers can take temporary courage from Kingsfield. Perhaps we need not be afraid of the aspiration to leave our students thinking like *good* lawyers, even if the process hurts a little.

But Kingsfield doesn’t advance a consideration of compassion. He is not very compassionate.<sup>37</sup> Ethical argument is appropriately personal and this puts special demands on those who join the argument—demands that have to do with compassion—demands that are illegitimate when made on our syllabus, perhaps, but are legitimate when made on our relations with our companions in the classroom. Socrates

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37. Compassion is an ethical issue in a discussion of Hebraic morals only because it is an issue *in* Hebraic morals. It is not an issue for professors such as Kingsfield; he would probably defend causing pain to his students. (I speak of the Kingsfield of John Jay Osborne’s novel *Paper Chase*, and of the movie, not of the loveable curmudgeon who appears on television.)

said to Thraysymachus that the two of them would *show* what justice is, by the way they treated one another in their argument over what justice is.<sup>38</sup>

Notice that I raise less discomfort citing Socrates on this point than I would have if I had cited—as I might have—Jesus or one of Martin Buber's Hassids to the same effect. That discomfort is what causes the issue about civility to recur. My argument is that we should not abandon either of these rabbis because of discomfort. But we should tend to the discomfort; we should, to use the verb as Luther used it, *minister* to the discomfort.<sup>39</sup>

The word from Luther, a great pastor, is enough to make the point about compassion. *What* one says, and how, and to whom, and when, are matters of circumstance and prudence. I don't propose to put words in anybody's mouth; the essence of the point is, anyway, less words than feelings. But perhaps a bit of personal experience will contribute to discussion:

I have not found that unbelievers are a problem. The secular humanists and agnostics that I work with agree that Hebraic moral tradition is a principal source of morals for Americans and that it would be bad history and bad ethics to leave it out of legal ethics. They go beyond that, usually, and demonstrate both kindness and civility, to provide their own insight on questions of moral theology. Some of them even notice that we believers take a piece of moral teaching—such as the section of Jesus' Sermon on the Plain that I translated for you—and bleach it of its color and its power. Sometimes the unbeliever is the one who notices how radical, and even how appealing, that moral theology is. And unbelievers are usually happy to contribute their own moral perspectives as a way of testing and enriching those contributed by the religious tradition. Last year one of my students wrote a splendid little essay on the legal ethics of Nietzsche. This year another student wrote on the ethical implications of Locke's version of the social contract. I don't think I would have got either of these if I had not spoken first of religious ethics.

My teaching has been mostly in universities that claim a specifically denominational Christian heritage.<sup>40</sup> That experience, taken with my own moral theology, suggests a special issue with respect to Jews. I have never found it a difficulty to have Jews in discussions of moral theology, and I have not found it necessary, because of Jews, to abandon my references to Christian moral thought. Jesus' ethics were, after all,

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38. I PLATO, *THE REPUBLIC* 613 (B. Jowett trans. 1937).

39. Shaffer, *The Legal Ethics of the Two Kingdoms*, VAL. U. L. REV. \_\_\_\_ (198 ).

40. At the University of Notre Dame (Roman Catholic), 1963-1980; and at Washington and Lee University (Presbyterian), 1980 to the present. Neither university is now affiliated with a church.

Jewish; what he added, if it is to be called an addition, is a certain view of how one is to live with Jewish ethics. It is not the case in ethics that a Christian need feel condescending when he says something about the Judeo-Christian tradition. Jesus was a Jewish moral thinker. What I think Jews have a right to expect is respect for other Jewish moral thinkers.

My experience has been that the occasional complaint about using religious teaching in law school doesn't come from Jews, nor from unbelievers, but from Christians who find such discussion uncomfortable *because* they are believers. It seems to me that our syllabus, which explicates such an issue and brings it into the university in terms both of its validity and its implications, is, as to such people, particularly appropriate. We have made the student's internal debate part of the intellectual stuff of his education—and we can do this without telling him that his head is full of mush. The rest is a matter of love. We Jews and Christians are, alas, experts at love.<sup>41</sup>

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41. I am grateful for the criticism and assistance of Louis M. Brown, Samuel W. Calhoun, Frederic Lee Kirgis, Jr., Lewis H. LaRue, Robert S. Redmount, and Nancy L. Shaffer.



