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Foreword

John J. Coughlin

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FOREWORD

REV. JOHN J. COUGHLIN, O.F.M.*

The English word “vocation” derives from the Latin “*vocatio*,” which means a summons or citation to appear in court.¹ Given the etymological derivation, it is appropriate for this issue of the *Notre Dame Journal of Law, Ethics & Public Policy* to draw attention to the topic of *Law and Politics as Vocation*. Law and politics remain distinct occupations with their own sets of public institutions. Of course, lawyers often serve as political officials in the various branches of government, and the study and practice of law have traditionally been seen as good preparations for a career in politics. It is also true that the public institutions of law and politics tend to overlap. The majority of contributors to this issue of the *Journal* are lawyers, many of whom also happen to be law professors. All of the *Journal* editors are law students whom I have been privileged to teach. Without intending any slight to politics as a vocation, my focus therefore is on the law.

As it has developed from the Latin, in which it meant a call to a court of law, the English word vocation has taken on a religious meaning. The first definition of “vocation” in *Webster’s Third International Dictionary* is a “summons from God to an individual or group to undertake the obligations and perform the duties of a particular task or function in life: a divine call to a place of service to others in accordance with the divine plan”² There

* Rev. John J. Coughlin, O.F.M., was ordained a Franciscan priest in 1983. He holds a B.A. Niagara University, M.A. Columbia University, Th. M. Princeton Seminary, J.D. Harvard Law School, and J.C.L., J.C.D., Pontifical Gregorian University. After law school graduation and admission to the New York Bar, he served as a law clerk to the Hon. Frank X. Altamari of the United States Court of Appeals for the Second Circuit. He has taught at St. Bonaventure University, St. Joseph’s Seminary, and St. John’s University School of Law. He currently serves as Professor of Law at the University of Notre Dame. In addition to teaching, he has practiced law, held administrative positions, and served as a member of the board of directors for several health care organizations and colleges. He has published in the areas of canon law, comparative law, administrative law, legal ethics, jurisprudence, constitutional law, and law and religion.

1. CHARLTON T. LEWIS & CHARLES SHORT, *A NEW LATIN DICTIONARY* 2003 (1907).

2. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2561 (1993).

is a secondary, and perhaps nowadays more common, meaning of the word "vocation" as an occupation or work in which a person is employed.³ Most of the articles in this issue of the *Journal* explore the reintroduction of the divine call as a motivation into the profession of law. While the remaining articles do not employ the idea of vocation in an explicitly religious sense, they nonetheless presume that law is in some way a higher calling. My focus, in these brief introductory remarks, is then further limited to the religious meaning of the word "vocation."

All three of the world's great monotheistic religions propagate a strong sense of the divine call. In the Torah, the fundamental call of the *Shema* is clear: "Hear, O Israel, the Lord our God is one Lord."⁴ Attracted to a burning bush in the desert, Moses is called to put himself at the service of the divine plan for the liberation of his people from oppression.⁵ The Gospels record that Jesus called the Twelve Apostles and many other persons "to leave all things and come and follow him."⁶ The Western notion of vocation is indebted to the primitive evangelical call. This call has an urgency in the here and now. It also has an eschatological dimension for the not yet, which Mozart expressed in the beautiful and haunting melody of his Requiem Mass, *Vocat me* ("He calls me"). The Qu'ran contains the statements "There is no god but Allah"⁷ and "Muhammad is His messenger," which are joined as one in the Muslim call to faith.⁸ The call to prayer (*Adhan*) is an essential aspect of the worship of Allah.⁹ Judaism, Christianity, and Islam share the belief that God calls the human person to a life of holiness.

Does the religious meaning of the divine call to holiness have any place in the life of the contemporary American attorney? From the nation's origins well into the nineteenth century, the members of the legal profession shared a common ethical commitment based upon Protestant faith.¹⁰ Protestant Christianity, with its emphasis on personal salvation, arguably already contained within itself the seeds of an ethic of individual autonomy

3. *Id.*; see also MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1400 (11th ed. 2005).

4. *Deuteronomy* 6:4.

5. *Exodus* 3:1-15.

6. *Matthew* 4:18-22; *Mark* 1:14-20, 2:13-14; *Luke* 5:1-11, 6:12-16.

7. AL-QUR'AN, 47:19 (Ahmed Ali trans., Princeton Univ. Press 1994).

8. *Id.*, 48:29.

9. See 1 ENCYCLOPEDIA OF ISLAM NEW EDITION 187-88 (E.J. Brill ed., 1960); Gerhard Bowering, *Prayer*, in 4 ENCYCLOPEDIA OF THE QUR'AN 215, 225-26 (Jane Dammen McAuliffe ed., 2004).

10. See Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27 (1998).

that would replace the corporate religious ethic.¹¹ During the nineteenth century, the process of the historical secularization of the institutions of American public life started to erode the Christian worldview of American lawyers.¹² The process has been successful to the extent that, at the start of the twenty-first century, both legal theory and practice indicate that the profession of law in the United States is just about entirely secular. From a theoretical perspective, for example, one has only to recall John Rawls' skepticism about the introduction of religious values into public discourse in a pluralist society.¹³ With regard to practice, law is increasingly viewed by some as more of a business than a profession. According to this view, the main object of the practice of law is to maximize profit for the practitioners and not to serve some lofty professional ideal.¹⁴ Certainly, the vast majority of attorneys in the United States are not rabbis, priests, or imams. The idea that religion is a private matter that has no collective significance in the legal field remains widely accepted. Given the secularity of legal theory and practice, how is it possible to consider the profession of law as a divine calling?

As with the word "vocation," the English word "profession," too, has a religious etymology. The word traces its roots to the profession of sacred vows by medieval religious, many of whom were also professors and students in the great universities at Paris, Oxford, and Bologna.¹⁵ As laymen began to join religious

11. See Keith G. Meador, "My Own Salvation," *The Christian Century and Psychology's Secularizing of American Protestantism*, in *THE SECULAR REVOLUTION: POWER, INTERESTS, AND CONFLICT IN THE SECULARIZATION OF AMERICAN PUBLIC LIFE* 269 (Christian Smith ed., 2003).

12. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 259 (2002).

13. In his earlier thought, Rawls seems to have been opposed to the introduction of any religious language or reason into public policy discussions. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 145–47 (1995). In a later writing, he relaxed this prohibition. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 781 (1997) (asking whether it is even possible "for citizens of faith to be wholeheartedly members of democratic society who endorse society's intrinsic political ideas and values. . ."); see also Patrick Neal, *Political Liberalism, Public Reason, and the Citizen of Faith*, in *NATURAL LAW AND PUBLIC REASON* 171, 177–78 (Robert P. George & Christopher Wolfe eds., 2000) (criticizing Rawls for not recognizing that persons with comprehensive religious worldviews may dissent from the doctrines of political liberalism, not on selfish grounds, but because they believe the liberal doctrine to be morally wrong); Paul Weithman, *Citizenship and Public Reason*, in *NATURAL LAW AND PUBLIC REASON*, *supra*, at 156–62 (rejecting John Rawls' position that citizens in the public forum ought not to make appeals to religious comprehensive worldviews).

14. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 9 (2000).

15. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 2, at 1811.

at the universities in the study of disciplines such as law, medicine, theology, and philosophy, the notion of a profession developed.¹⁶ When one speaks of the legal profession today, religious vows of chastity, poverty, and obedience are probably not the first thing to come to mind. Rather, one might think of a means of making a living, specialized knowledge, formal training, social prestige, and a monopoly on the provision of services.¹⁷ A profession has become a secular occupation. It is fair to observe that the student editors of the *Journal*, who selected the topic of this issue, as well as the authors, who have contributed articles, perceive the secularization of American public life, and specifically of the legal profession, to be problematic. As I share this perception, I suggest four reasons to believe that the moment is ripe for a rethinking of secularization, and I offer two caveats about considering law as a vocation.¹⁸

First, there is a discontinuity between the centrality of religion in the lives of many attorneys as opposed to religion's irrelevance to the nation's public institutions, such as the legal profession. The devout believer develops a worldview based on religion. The deepest values of the believer tend to be expressed in religious language and metaphors. As the testimony of martyrs reveals, the believer may even be willing to die for the sake of the faith.¹⁹ The believer who also happens to be an attorney is likely to have a difficult time separating deeply held convictions about the nature of reality from the practice of law. For the secularist, religious convictions can at most serve as a private motivational factor for the individual attorney. It is part of the secularist creed that religious language and values are too divisive to be accepted into the practice of law in a religiously pluralist society.²⁰ A question might be raised as to why a position taken upon the basis of religious conviction with regard to a controversial issue is more divisive than another position that is not based on religious conviction. For example, in a public debate

16. See EDWARD GRANT, *THE FOUNDATIONS OF MODERN SCIENCE IN THE MIDDLE AGES: THEIR RELIGIOUS, INSTITUTIONAL, AND INTELLECTUAL CONTEXTS* 35-38 (1996).

17. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615.

18. See Christian Smith, *Rethinking the Secularization of American Public Life*, in *THE SECULAR REVOLUTION: POWER, INTERESTS, AND CONFLICT IN THE SECULARIZATION OF AMERICAN PUBLIC LIFE* 1, 7-12 (Christian Smith ed., 2003).

19. See BRAD S. GREGORY, *SALVATION AT STAKE: CHRISTIAN MARTYRDOM IN EARLY MODERN EUROPE* 342-52 (1999).

20. See *Lemon v. Kurtzman*, 403 U.S. 602, 603-04 (1971) ("Political division among religious lines was one of the evils at which the First Amendment aimed . . .").

about the death penalty, why is a religiously motivated position against capital punishment more divisive than a secular argument in favor?

Although not pertaining specifically to the legal profession, several articles in this issue of the *Journal* address the question of religious values in public discourse. Jesuit Father William O'Neill discusses the ways in which faith contributes to discourse in the public square.²¹ In contrast to the pristine Rawlsian position, O'Neill indicates that protection of human rights is advanced by religious reasoning. It follows that to the extent that an attorney's practice involves claims about the protection of human rights, it is permissible to support those claims with religious reasoning. Professor Michael Hatfield argues that the financial consequences of loss of tax exempt status to the church that "campaigns from the pulpit" are not significant enough to silence the introduction of religious values into public discourse.²² The articles of Congressman Joel Hefley²³ and Tom Feeney²⁴ describe the lived experience of the true believer in enriching public discourse with religious values. As far as the religiously motivated attorney is concerned, there are a number of possible responses to the question about the introduction of religious value into public discourse. Some lawyers are undoubtedly content to keep the sense of vocation as a private matter within the sanctuary of the individual conscience. They will approach their legal work in a secular mode even as they are motivated by a deeper religious sense. Others may chose to express religious convictions through natural law arguments that do not depend on revelation or religious language. However, some lawyers will deem that silence or natural law does not do justice to deeply held religious values. Is public discourse truly democratic when it excludes the expression of religiously motivated attorneys' deepest beliefs, ideals, values, and aspirations?

Second, studies of the legal profession reveal that lawyers increasingly find their work unfulfilling. Law professors such as Patrick Schiltz and Thane Rosenbaum have identified a spiritual

21. William R. O'Neill, *Modernity and Its Religious Discontents: Catholic Social Teaching and Public Reason*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 295 (2006).

22. Matthew Hatfield, *Ignore the Rumors—Campaigning From the Pulpit is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125 (2006).

23. Joel Hefley, *Congress and Religion: One Representative's View*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335 (2006).

24. Tom Feeney, *Principles Matter: Policy Making Based On First Principles*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 365 (2006).

crisis affecting the American legal profession.²⁵ It is observed that lawyers have become more interested in winning than in truth. They tend to work long hours in order reap handsome financial gain while finding their lives to be spiritually hollow. It seems that the more law is viewed as a business and less as a noble profession, the less satisfied are lawyers' professional lives. However, the lawyers who have contributed to this issue of the *Journal* appear to have found profound meaning through an understanding of their professional service as motivated by religious faith. Although not necessarily from a faith perspective, Professor Elizabeth Loder²⁶ explores the role of gratitude in fostering the enthusiasm of the lawyer as an advocate for justice. From a Christian perspective, the works of Father Robert Araujo, S.J.,²⁷ and Professor John Breen²⁸ suggest that religiously motivated lawyers are likely to discover enthusiasm, gratitude, and justice on the basis of faith. A student note written by Joseph La Rue²⁹ draws on the scholarship of Professor M. Kathleen Kaveny to propose that the lawyer's work reflect "redemptive time."³⁰ David Thunder, a Ph.D. candidate in philosophy at Notre Dame, observes that the requirements of "professional and personal excellence are fundamentally interdependent."³¹ Could it be that seeing law as a vocation serves an antidote to the disenchantment of so many lawyers?

Third, one of the primary justifications originally advanced for the secularization of the legal profession now seems untenable. This justification was based on an erroneous epistemology that posited law as a science in opposition to religious truth claims. Starting after the Civil War, proponents of the "science of law" movement sought to identify objective principles of law in

25. See THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE* 285–95 (2004); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 881–88 (1999).

26. Reed Elizabeth Loder, *Lawyers and Gratitude*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 175 (2006).

27. Robert J. Araujo, *The Impact of Catholic Social Teaching and the Call to Discipleship*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 29 (2006).

28. John M. Breen, *The Catholic Lawyer: "Faith" in Three Parts*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 431 (2006).

29. Joseph E. La Rue, *Redeeming the Lawyer's Time: A Proposal for a Shift in How Attorneys Think About—and Utilize—Time*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 473 (2006).

30. See M. Kathleen Kaveny, *Billable Hours in Ordinary Time: A Theological Critique of the Instrumentalization of Time in Professional Life*, 33 LOY. U. CHI. L.J. 173 (2001).

31. David Thunder, *Can a Good Person Be a Lawyer?*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 313, Part V.D. (2006).

order to establish a rational legal system.³² A leading proponent of this movement, Christopher Langdell, argued that law considered as a science consists of certain principles or doctrines which constitute a self contained system.³³ The objectivity, neutrality, and autonomy of the law delegitimized any religious basis for legal decision making. The science of law movement was consistent with a larger ideological framework in which scientific fact was understood to conflict with religious faith.³⁴ By the conclusion of the twentieth century, however, that framework had collapsed. It is much more helpful to understand scientific and religious claims about truth as complementary rather than fundamentally incompatible.³⁵ The view that science is objective and truthful, as opposed to religion, which is irrational and obscurantist, has not proved a useful assumption in legal reasoning. This is perhaps nowhere more evident than in cases in which government officials grapple with establishing the legal parameters for the use of modern technology in a way that serves the common good.³⁶

The *Journal* is privileged to offer Bishop Anthony Fisher's article, *Duties of a Catholic Politician with Respect to Bio-Lawmaking*.³⁷ He describes the ways in which lawyers may bring important moral considerations to bear on public policy about the use of science and technology. Faithful to his Dominican heritage, Bishop Fisher relies on a Thomistic natural law approach to *Evangelium vitae* No. 73.³⁸ Professor Peter Henning presents an analysis of the lawyer's obligation to the truth and zealous advocacy for the client.³⁹ His argument for honesty in the practice of law rests on an epistemology that accepts the validity of a broader basis for truth than that which science alone offers. Given the flawed presumption that science and religion must be at odds,

32. See David Sikkink, *From Christian Civilization to Individual Civil Liberties: Framing Religion in the Legal Field, 1880–1949*, in *THE SECULAR REVOLUTION: POWER, INTERESTS, AND CONFLICT IN THE SECULARIZATION OF AMERICAN PUBLIC LIFE* 310 (Christian Smith ed., 2003).

33. See ARTHUR E. SULLIVAN, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN* 174 (1967).

34. See DAVID LINDBERG & RONALD NUMBERS, *GOD AND NATURE: HISTORICAL ESSAYS ON THE ENCOUNTER BETWEEN CHRISTIANITY AND SCIENCE* 6 (1986).

35. See STEPHEN SHAPIN, *THE SCIENTIFIC REVOLUTION* 198 (1996).

36. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

37. Anthony Fisher, *The Duties of a Catholic Politician With Respect to Bio-lawmaking*, 20 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 89 (2006).

38. See *id.* notes 32–56 and accompanying text.

39. Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 209 (2006).

does the understanding of law as a vocation offer the legal profession a more inclusive epistemology, one which accepts the complementarity of truth claims based on science and religion?

Fourth, secularization of the work of the lawyer has weakened the notions of civic mindedness and the common good. The science of law movement in the United States was quickly followed by two other movements—sociological jurisprudence and legal realism—which attacked legal formalism.⁴⁰ Sociological jurisprudence called attention to the ways in which social and economic conditions, and not formal principles, determine legal outcomes.⁴¹ Following the lead of Oliver Wendell Holmes, Jr., legal realists maintained that legal outcomes reflected the experience of judges rather than formal legal principles.⁴² The attack on legal formalism was also a repudiation of the function of religious faith in the professional lives of lawyers. Holmes wrote: “The common law is not a brooding omnipresence in the sky.”⁴³ For both the sociological and realist schools, formalism’s insistence on a metaphysical unity of reality had to cede to pragmatic policy considerations. At the same time, legal positivism, derived primarily from European theorists, downplayed the significance of moral value to the law.⁴⁴ Positivism’s separation of law from morality was well matched with the philosophical pragmatism of sociological jurisprudence and legal realism.

The cumulative impact of these three movements—sociological jurisprudence, legal realism, and legal positivism—reduced the role of religious values in the legal system.⁴⁵ It reinforced the understanding that religion was a purely private matter irrelevant to the life of a society’s public institutions. During the first half of the twentieth century, the movements contributed to the creation of a class of reformist lawyers who understood the law as an instrument to bring about social change through the advancement of individual rights.⁴⁶ A common morality for lawyers based on a shared metaphysical understanding was replaced by “psychological constructions of the self centered on personality, instinct and desire.”⁴⁷ Lawyers’ concerns for civic mindedness

40. See Sikkink, *supra* note 32, at 334.

41. See WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 15 (1998).

42. See Pepper, *supra* note 17, at 624–25.

43. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917).

44. See Frederick Schauer & Virginia J. Wise, *Legal Positivism As Legal Information*, 82 CORNELL L. REV. 1080, 1081 (1997) (describing the enduring influence of legal positivism).

45. See Sikkink, *supra* note 32, at 334.

46. See *id.* at 349–50.

47. See Smith, *supra* note 18, at 27.

and the common good were supplanted by concerns for individual autonomy and rights. In his book *The Lost Lawyer*, the former dean of the Yale Law School, Anthony T. Kronman, calls for a retrieval of an understanding of the lawyer as a “statesman” who consistently puts the common good ahead of any subjective concerns.⁴⁸ While Kronman’s perspective is not expressly religious, this traditional view of the civic minded lawyer was linked with a metaphysical understanding of the divinely created human person who as a social being prospered by participation in a justly ordered society. Might the reintroduction of the notion of law as a vocation, with its attendant classical metaphysical view of the human person, assist in making lawyers more civic minded and attuned to the common good?

The readers of this issue of the *Journal* will also be enriched by Professor Alan Mittleman’s article,⁴⁹ which expresses concern about the religious notion of vocation in public life. A distinguished professor at the Jewish Theological Seminary, Mittleman reminds us that the politics of public life require a theory of compromise and adjustment, rather than simply one based upon sanctification or salvation. He points to the figure of Abraham Lincoln as someone who embodied the civic minded ideal, in which religious and moral convictions are balanced with pragmatic political concerns. Mittleman cautions both the secular left and the religious right about “fooling themselves” that complex public policy issues “can be decided along a single axis of judgment, whether it be adjudicating rights claims, maximizing benefits, or promoting fidelity to presumptive biblical morality.”⁵⁰ The caution leads to my two caveats.

First, the four reasons discussed above, which support a rethinking of the secularization of the legal profession, are not intended to deny the validity of the secular. The secular refers to temporal considerations that are important and necessary aspects of individual and social life. The notion of the secular carries no inherently negative connotation. To the contrary, the politics of the temporal or secular sphere rightfully enjoy autonomy from religion. The secularization of society’s public institutions and the legal profession, however, involves the intentional rejection and exclusion of religious values from public discourse. Assuming *arguendo* that many lawyers began to assert and act upon religious convictions in light of the belief that the profes-

48. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11–14 (1993).

49. Alan Mittleman, *Weber’s “Politics as Vocation”: Some American Considerations*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 279 (2006).

50. *Id.* at 293.

sion involves a divine call, there would certainly remain many strong and entirely secular voices among lawyers in the public square. At this point in the history of the American legal profession, it is not secularity that is in danger. Rather, the exclusion of religious belief and values from the profession poses the danger that the profession becomes in fact, and is perceived by the public to be, devoid of moral value. In other words, the secular could profit from a dialog with the religious.

The second caveat goes to considering law in the sense of a religious vocation. In keeping with the understanding of the secular as an autonomous fundamental good, the attorney functions as an officer of the court and not a minister of religion. Here, I speak from the personal experience of one who is both a priest and a lawyer. Theologically, the rabbi, Islamic cleric, Protestant minister, or Catholic priest holds an office that is rooted in a divine call to serve the faith community. Such persons exercise a distinctly theological vocation in their respective faith communities. As a result of my religious vocation, I am grateful to hold the office of priest and humbled by my unworthiness. Although I am also privileged to be an attorney, I do not consider my life in the law to be a divine calling in the same sense as that of priesthood. To be sure, I believe that the attempt to lead a holy life can be integrated with the teaching and practice of law. In this sense, I concur with Professor Lee J. Strang when he calls for professors and practitioners of the law to be modern day saints.⁵¹ As mentioned earlier in these introductory comments, Judaism, Christianity, and Islam all offer paths to holiness for their adherents. The vocation to holiness is expressed in a particular way in the life of a lawyer according to the functions and responsibilities entrusted by society to the profession. The various contributors to this issue of the *Journal* have elucidated the ways in which the attorney may understand the function of a lawyer, with its particular obligations to individuals and society, as a vocation to noble service.

51. Lee J. Strang, *The Role of the Modern Christian Legal Scholar: The Call for a Modern St. Benedict*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 59 (2006).