

Religious Legal Theory's "Second Wave"

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I. LESSONS FROM THE RELIGIOUS LAWYERING JOURNEY

In tracing the contours of the religious legal theory "state of the field," I would like to draw a parallel with the journey of what has been the focus of my work and scholarship for the past ten years: "religious lawyering"—the ongoing conversation about integrating religious values into the practice of law.¹

My Fordham colleague Russell Pearce and I have identified two "waves" in the religious lawyering movement.² In its "first wave," religious lawyering scholarship and organizational attention tended to be path-breaking or sporadic.³ Its tone was often exploratory and, at times, "apologetic."⁴ From a professional perspective, the questions that formed the framework for this first wave included whether or not lawyers should bring religious values to bear on their professional work, and the extent to which such obligations might clash with other legal and ethical norms.⁵ From a religious perspective, questions often included the extent to which lawyers' religious obligations ex-

* Director, Fordham University School of Law Institute on Religion, Law & Lawyer's Work. This Essay was a plenary address to the Seton Hall University School of Law conference Religious Legal Theory: The State of the Field (November 12–13, 2009). Citations do not reflect a complete survey of the literature in the field; some of the essays noted herein do include a partial survey current through their date of publication.

¹ For information and publications included thereon, see Institute on Religion, Law & Lawyer's Work, Fordham Law Sch., <http://law.fordham.edu/institute-religion-law-lawyers-work/lawreligion.htm> (last visited Mar. 6, 2010).

² See generally Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering's Second Wave*, 21 J.L. & RELIGION 269 (2006). The first part of this Essay includes some material from previously published analyses of religious lawyering trends and scholarship.

³ *Id.* at 272.

⁴ I use "apologetic" in the religious sense of the term. See 1 *Peter* 3:15 (New International Version) ("Always be prepared to give an answer to everyone who asks you to give the reason for the hope that you have. But do this with gentleness and respect.").

⁵ Pearce & Uelmen, *supra* note 2, at 272.

tended to their conduct as lawyers.⁶ Some commentators responded with caution, identifying both religious and professional considerations that might limit or exclude religion's influence in the professional domain. One of the most prominent arguments against integrating religious values was, in the words of Sanford Levinson, that professionalism requires lawyers to "bleach out" all personal aspects of their identity, including religion.⁷ In contrast, others expressly rejected the "bleaching out" analysis as a normative matter.⁸ Some emphasized instead either the conflict between faith and professional values,⁹ or the extent to which religious values coincide with professional values, such as obligations to promote justice and help the poor, and the ways in which legal ethics leaves lawyers discretion to bring their religion into their work.¹⁰ Others rejected the "bleaching out" analysis as a descriptive matter, asserting that religious lawyering and professionalism were mutually reinforcing or that many conceptions of religious lawyering fit well within the discretion afforded lawyers under professionalism.¹¹

Russell Pearce and I have also critiqued the "bleached out" model for its tendency to sever people from the source of their deep values and commitments, which often leads to profound personal dissatisfaction and disorientation.¹² In particular, we have highlighted that what is at stake in the religious lawyering conversation is not just the creation of a framework for the interaction of religion and law in professional and social life, but also the struggles of lawyers as people to find personal meaning and integration in their lives.¹³

As Russell Pearce and I submit, "[a]t its core, religious lawyering is an invitation to appreciate the ways that [our] democracy leaves room for a variety of approaches and perspectives to enrich the prac-

⁶ *Id.* at 274.

⁷ See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1993).

⁸ See Pearce & Uelmen, *supra* note 2, at 275.

⁹ *See id.*

¹⁰ *See id.*

¹¹ Pearce & Uelmen, *supra* note 2, at 275.

¹² See Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127, 149–50 (2004).

¹³ *Id.* at 150–52; see also Amelia J. Uelmen, *Can a Religious Person Be a Big Firm Litigator?*, 26 FORDHAM URB. L.J. 1069, 1079 (1999) ("Let's be clear about the stakes: asking me not to act in accord with [a sense of obligation grounded in religious reflection] . . . is to ask me to let go of my deepest sense of what it means to be a person.").

tice of law without detracting from its essential values.”¹⁴ We believe that a more effective way to promote the rule of law is to honestly acknowledge and manage our differences rather than deny that they exist.¹⁵ As Martha Minow has observed, “[Y]ou cannot avoid trouble through ignoring difference; you cannot find a solution in neutrality.”¹⁶

Building on this increasing space for reflection, we see the “second wave” of religious lawyering scholarship as “tend[ing] to assume that there should be space for lawyers to bring their religious values into their professional work, and thus focusing on more concrete and complex explorations of *how* to work as a religious lawyer.”¹⁷

This is not to say that the second wave of religious lawyering scholarship skirts the pervasive questions about how faith perspectives may interact and clash in a liberal democracy. Rule 2.1 of the Model Rules of Professional Conduct, which provides that in counseling clients, lawyers are permitted to move beyond strictly “legal” considerations in order to refer to a host of factors that might be relevant to a client’s particular situation,¹⁸ is the beginning, not the end, of the story.¹⁹

Questions persist about exactly how lawyers and the legal profession can foster robust respect for diverse religious and cultural identities in our society. Even if one welcomes the move toward a more transparent account of how religious values and frameworks might inform one’s legal work and interactions, questions remain about the impact of such integration on religious minorities. A second and related worry is that allowing more room for religion in the public square will inevitably lead to divisiveness and intolerance, thus adding further fuel to the fires of polarizing culture wars.²⁰

Scholarship also continues to probe the extent to which some of these concerns and questions may be grounded in misperceptions and stereotypes about religion and religious people. For example,

¹⁴ Pearce & Uelmen, *supra* note 12, at 159.

¹⁵ *Id.*

¹⁶ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW, 374–75 (1990).

¹⁷ Pearce & Uelmen, *supra* note 2, at 275.

¹⁸ See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2007).

¹⁹ See Pearce & Uelmen, *supra* note 12, at 154–56; Pearce & Uelmen, *supra* note 2, at 276; Uelmen, *supra* note 13, at 1081–83, 1093–102.

²⁰ See Pearce & Uelmen, *supra* note 12, at 157; Pearce & Uelmen, *supra* note 2, at 276–77.

the assumption that religion leads to divisiveness is often based on a perception of religious traditions as monolithic. But in reality, religious perspectives both within and among different religious traditions run the cultural gamut and intersect with secular perspectives at many points along the spectrum. Further, the assumption that religious people are intolerant and incapable of complex interactions in a pluralistic society is a stereotype. Beyond stereotypes, neither religious nor nonreligious people have a monopoly on small-mindedness or generosity of spirit.²¹

So what is the upshot? Religious lawyering scholarship, and the religious lawyering movement as a whole, has been sensitive and responsive to “secular” and professional critique and suggestions. Common sense would grant that if a lawyer’s religious approaches to lawyering generate discrimination or intolerance, the lawyer’s conduct should be subject to professional and social critique, and discipline where appropriate, just as any other approach to lawyering that is less than respectful of others. Common sense would also grant that to the extent that religious approaches and perspectives are difficult for others to understand, religious lawyers should work harder to make themselves understood—as would be reasonable to ask of any attorney who fails to communicate her views effectively.²² In fact, religious lawyering’s second wave has included the work of creating institutional structures and more consistent forums through which lawyers might reflect on and perhaps even “practice” articulating the connections that they are drawing between their religious faith and their practice areas.²³

How might this trajectory speak to the broader religious legal theory project? As with religious lawyering, I believe we are past the first wave of religious legal theory. The question is no longer “whether or not” religious perspectives should be integrated into legal scho-

²¹ Pearce & Uellen, *supra* note 12, at 158–59 (citations omitted); Uellen, *supra* note 13, at 1083–86.

²² See Pearce & Uellen, *supra* note 12, at 159; see also Uellen, *supra* note 13, at 1088–91.

²³ Pearce & Uellen, *supra* note 2, at 272–74. The Institute on Religion, Law & Lawyer’s Work has programs that run along three “tracks”—those geared toward helping lawyers delve into the nexus between an area of practice and their specific faith tradition, those that aim to foster interfaith exchange, and those that bring internationally diverse legal professionals together. INST. ON RELIGION, LAW & LAWYER’S WORK, FORDHAM LAW SCH., PROMOTING THE INTEGRATION OF RELIGIOUS VALUES INTO THE PRACTICE OF LAW 1, available at http://law.fordham.edu/assets/LawReligion/Law_Religion_brochure.pdf.

larship. Both as a normative and as a descriptive matter, many forums have welcomed religious perspectives as bringing a legitimate and even important contribution to legal theory.²⁴ This approach also fits neatly into other legal theory conversations that draw on how cultural perspectives inform and shape one's view of the law and legal categories, and that reflect on how moral and ethical perspectives might be integrated into various fields of law. As for religious lawyering, religious legal theory's second wave questions are *how* to pursue this trajectory and what cultural equipment and institutional structures might foster the project's depth and nuance.

II. THEORIZING A SPACE BEYOND TOTALIZING THEORIES

Several of the scholars presenting papers at this conference have focused on how religious legal theory poses a deep and provocative challenge to "totalizing" systems and their claims. Zachary Calo, for example, discussed the human rights movement as an expression of western liberalism, which presents itself as a "totalizing moral theory" and which seems to leave very little room for contrasting theological accounts of human rights.²⁵ Similarly, in the field of corporate law, Lyman Johnson brought religious legal theory to bear on the effort to move beyond the totalizing theory "profit-maximization" and, I would add, the chokehold that the harder edges of the law and economics

²⁴ Many of the institutions that have dedicated resources to religious lawyering have also spawned programs, conferences and scholarship to explore the contours of religious legal theory. See Pearce & Uelmen, *supra* note 2, at 272–73. For developments in my own scholarship, I am indebted to the relatively new Conference on Catholic Legal Thought (CCLT), a summer colloquium initiated in June 2006, which now rotates geographically among various law schools. See Fordham Univ. Sch. of Law, Catholic Legal Thought Conference, <http://law.fordham.edu/institute-religion-law-lawyers-work/11947.htm> (last visited Mar. 5, 2010). The CCLT aims to foster a collegial exchange among law professors who teach and write "at the intersection of Catholic Social Thought and the Law." *Id.* This, and other such collaborative efforts, may also serve as a forum to support untenured faculty as they navigate the issue of whether they should broach religious legal theory projects early in their careers—a question that surfaced during this symposium.

²⁵ See Zachary R. Calo, Associate Professor of Law, Valparaiso Univ. Sch. of Law, Address at the Seton Hall University School of Law Religious Legal Theory Conference: Beyond Universalism: Religion, Human Rights and Post-Secular Legal Thought (Nov. 12, 2009) (on file with author) (discussing the role of religion in resisting what Stephen Carter identifies as "the hegemonic pull of a totalizing liberalism—that is a liberalism that moves beyond offering the basis for peaceful interaction to embodying a complete worldview" (quoting Stephen L. Carter, *Liberal Hegemony, Religious Resistance*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25 (2001))).

movement has had on how we imagine corporate law, structures, and responsibilities.²⁶

These “totalizing” theories run parallel to the “bleaching out” approach to the lawyer’s role.²⁷ They often purport to function as a seemingly “neutral” rationale and accessible approach to a particular area of the law,²⁸ but in reality these theories are just as value laden as any religious system of thought. Once this limitation is unmasked, however, the worry remains that religious systems of thought introduce the danger of clashing totalizing theories, with the added concern that not all of the resources brought into the conversation will be completely accessible to all of the conversation partners. Are the various strains of religious legal theory simply other totalizing theories that tend to monopolize and shut down the discourse? Is religion, as Richard Rorty put it, “a conversation stopper?”²⁹

Having observed the religious lawyering discourse for some time, I believe that some of these worries might be grounded in misperceptions, stereotypes, and a lack of actual experience in constructive conversation and exchange across traditions, including religious traditions. In my experience, actual engagement with diverse religious traditions and perspectives, when it unfolds in an atmosphere of sincerity and trust, often opens out toward an increasing appreciation, not only for the complexity of the various traditions and how they might engage one another, but also for how they might intersect with secular streams of thought.³⁰

²⁶ See Lyman Johnson, Robert O. Bentley Professor of Law, Washington & Lee Univ. Sch. of Law and Lejeune Distinguished Chair in Law, Univ. of St. Thomas Sch. of Law, Address at the Seton Hall University School of Law Religious Legal Theory Conference: Re-Enchanting the Corporation (Nov. 12, 2009), in 1 WM. & MARY BUS. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1519103>.

²⁷ See Levinson, *supra* note 7, at 1578.

²⁸ See generally Kevin P. Lee, *The Foundations of Catholic Legal Theory: A Primer*, in RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW 15, 18-21 (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007).

²⁹ Richard Rorty, *Religion as a Conversation Stopper*, 3 COMMON KNOWLEDGE 1 (1994).

³⁰ My own exposure to interreligious dialogue is grounded in the theory and practice of the Focolare, one of the relatively new movements within the Roman Catholic Church. See JOHN L. ALLEN, JR., THE FUTURE CHURCH 188-90 (2009) (discussing the Focolare’s approach to interreligious dialogue); Amelia J. Uelmen, *Reconciling Evangelization and Dialogue Through Love of Neighbor*, 52 VILL. L. REV. 303 (2007) [hereinafter Uelmen, *Reconciling*]; Amy Uelmen, *Walking Together in Jerusalem*, LIVING CITY, May 2009, at 10 (reflecting on the Focolare’s third international Jewish-Christian symposium).

If religious legal theories are not in and of themselves “totalizing” claims, or if they are not intended to have “totalizing” effect, then the key question becomes: how do we theorize a space beyond totalizing theories? If I were to map the future of the religious legal theory project, I would leave plenty of room for each religious tradition to explore the religious resources that might foster open conversation in a pluralistic society, without denying the need for a space to work out each tradition’s distinctive contribution to the conversation. A related project would be to explore how religiously grounded frameworks might run parallel to, or be in conversation with, the resources of other traditions or with secular frameworks.

To make this concrete, I would like to give a snapshot of how I am wrestling with my current work in progress, which explores whether Trinitarian theology might shed light on the common-law doctrine that there is generally no tort duty to rescue, even to “easy” rescue.³¹ Here is the well-worn example: a small child is drowning in a wading pool, and a passerby, with no danger to herself, could easily reach in and pull the child out of the water. Does the passerby have any legal duty to help? For most first-year law students, it comes as a shock to learn that in almost all jurisdictions in the United States the answer is no.³²

As the story goes, one of the central problems in imposing a legal duty to rescue is that it interferes with the notion of liberty in which the self and others are in fundamental tension. As Professor Richard Epstein wrote in his staunch defense of the no-duty-to-rescue rule, “Once one decides that . . . an individual is required under some circumstance to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty.”³³ Or, as philosopher Michael Menlowe summarized, “The more I have to do for other people, the less I can do for myself. . . . The more extensive the duty to rescue, the more an agent’s individuality is threatened.”³⁴ “If I

³¹ See RESTATEMENT (SECOND) OF TORTS § 314 (1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

³² See, e.g., WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 340 (4th ed. 1971).

³³ See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198 (1973).

³⁴ Michael A. Menlowe, *The Philosophical Foundations of Duty to Rescue*, in THE DUTY TO RESCUE: JURISPRUDENCE OF AID 5, 38 (Michael A. Menlowe & Alexander McCall Smith eds., 1993).

am required to promote the good,” I may be prohibited from regarding my own interests as special, and then my integrity is threatened.³⁵

The project to which I have been drawn is to take arguably the most mysterious of quintessentially Christian dogma, the Trinity, and explore how contemporary Trinitarian theology might help resolve knotty problems in legal theory.³⁶ So far it has not been a conversation stopper. In fact, the first person to encourage me in this work was my Jewish torts professor, who resonated deeply with the framework.³⁷

Here is one way to describe the connection between Trinity and human relationships, from a Roman Catholic perspective:

The revelation in Christ of the mystery of God as Trinitarian love is at the same time the revelation of the vocation of the human person to love. This revelation sheds light on every aspect of the personal dignity and freedom of men and women, and on the depths of their social nature.³⁸

A document from the Second Vatican Council, *Gaudium et spes*, explains further:

Indeed, the Lord Jesus, when He prayed to the Father, “that they may all be one . . . as we are one” opened up vistas closed to human reason, for He implied a certain likeness between the union of the divine Persons, and the unity of God’s sons in truth and charity. This likeness reveals that man, who is the only creature on earth which God willed for itself, cannot fully find himself except through a sincere gift of himself.³⁹

What work does this model do? Pope Benedict XVI connected some of the dots between Trinitarian theology and the social sciences in his recent analysis of social and economic life, *Charity in Truth* (Ca-

³⁵ *Id.*

³⁶ See, e.g., Amelia J. Uelmen, *Toward a Trinitarian Theory of Products Liability*, 1 J. CATH. SOC. THOUGHT 603, 604 (2004) (discussing how Catholic Social Thought can offer profound solutions to the knottiest dilemmas in products liability theory).

³⁷ *Id.* at 603 (dedicating the article to Professor Michael H. Gottesman, my first-year torts professor at Georgetown University Law Center “whose profound humanity deeply influenced my initial exposure to and critique of products liability theories”).

³⁸ PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH pt. 1, ch.1, § III.a, ¶ 34, at 16 (2003). The Compendium summarizes the tradition of papal commentary on contemporary social and economic conditions, which began in 1871 with a letter on working conditions, *Rerum Novarum*.

³⁹ SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: *GAUDIUM ET SPES* ¶ 24 (1965) (quoting *John* 17:21–22 and citing *Luke* 17:33).

ritas in veritate).⁴⁰ According to the pope, Trinitarian theology can provide the basis for a vision of individual fulfillment in the context of the unity of the human family: the life of communion at the heart of the Trinity is a lens through which we can see “all individuals and peoples within the one community of the human family.”⁴¹ The pope further explained: “God desires to incorporate us into this reality of communion as well: ‘that they may be one even as we are one.’”⁴²

In addition, reflections on the Trinitarian life of God can provide insight into what it might mean for a human being to “open oneself” and relate to the needs of others without having one’s own identity swallowed up in the process. According to Pope Benedict, in the life of the Trinity, “true openness means, not loss of individual identity, but profound interpenetration.”⁴³ This is possible through an essential attitude of openness to the other, of “making room” for the other, even to the point of “emptying” oneself for the other, in Greek, *kenosis*.⁴⁴ In a Trinitarian model, this openness or emptiness is not a negative encroachment on one’s personhood, but actually the positive key to self-fulfillment.⁴⁵ Freedom consists of the essential capacity to open oneself to the other. It is, at its core, relational.⁴⁶

On the flip side, Pope John Paul II had explained in a 1991 document, *Centesimus annus*:

When man does not recognize in himself and in others the value and grandeur of the human person, he effectively deprives himself of the possibility of benefitting from his humanity and of entering into that relationship of solidarity and communion with others for which God created him. Indeed, it is through the free gift of self that man truly finds himself.⁴⁷

⁴⁰ See generally Pope Benedict XVI, Encyclical Letter, *Caritas in veritate* [Charity in Truth] ¶ 34 (June 29, 2009).

⁴¹ *Id.* ¶ 54.

⁴² *Id.* (quoting *John* 17:22).

⁴³ *Id.*

⁴⁴ Uelmen, *supra* note 36, at 623 (citing John Paul II, Apostolic Letter, *Novo millennio inuente* ¶ 43 (Jan. 6, 2001)).

⁴⁵ *Id.* at 623–24 (discussing the link with Pope John Paul II’s description of a “spirituality of communion”).

⁴⁶ Amelia J. Uelmen, *Traveling Light: Pilgrim Law and the Nexus Between Law, Politics and Catholic Social Teaching*, 22 J.L. & RELIGION 445, 473–74 (2007) (discussing the link with Pope John Paul II’s analysis in *Centesimus annus*, *infra* note 47).

⁴⁷ Pope John Paul II, Encyclical Letter, *Centesimus annus* [The Hundredth Year] ¶ 41 (May 1, 1991) [hereinafter *Centesimus annus*].

Applied to social relationships, Trinitarian theology pushes beyond an effort to manage fairly what would otherwise be clashing interests.⁴⁸ Because this theological lens posits that a life of communion is the essence of the structure of reality, one may submit that to act in a way that acknowledges the other as the living image of God, to “make room” for the other, is a true and positive good and more characteristic of an authentically human life.⁴⁹

Returning to the problem of the common law no-duty-to-rescue, viewing social relationships through the lens of Trinitarian theology reveals the full consequences of the notion that the drowning stranger and I are part of the same human community, and in some way even resolves the central tension between the needs of the victim and the freedom of the rescuer.⁵⁰ The central dynamic shifts away from a question of balancing, because through this Trinitarian lens, openness to another’s needs, in this case the need for emergency assistance, is not an inconvenience but an opportunity for human fulfillment.⁵¹

Further, if I walk away from the drowning person, the problem is the drastic impact, not only on the “stranger,” but also on myself. To paraphrase John Paul II, if I do not recognize in others the value and grandeur of the human person, I effectively deprive myself of the possibility of entering into a relationship of solidarity and commu-

⁴⁸ See Uelmen, *supra* note 36, at 624–25 (discussing how a Trinitarian dynamic pushes beyond a model based on social contract or principles of equality); see also Luigino Bruni & Amelia J. Uelmen, *Religious Values and Corporate Decision Making: The Economy of Communion Project*, 11 *FORDHAM J. CORP. & FIN. L.* 645, 651–53 (2006) (discussing an economic model based on similar principles).

⁴⁹ Uelmen, *supra* note 36, at 625–26. See also Bruni & Uelmen, *supra* note 48, at 648 (“[T]he essence of human experience is to be ‘in communion. . . .’ In the core of our being, our deepest fulfillment is found in a life of communion, in loving, in giving.”).

⁵⁰ *Cf.* Uelmen, *supra* note 46, at 477 (“Viewing equality through the lens of reciprocal love helps everyone to see their own radical dependence on others, and the value of building structures in which . . . forms of social organization, production and consumption make it easier for people to offer the gift of self and to establish solidarity between people.”).

⁵¹ *Cf. id.* at 475 (“When freedom is defined through a Trinitarian lens, the privileged classes *can* know that ‘giving the poor their rights’ is *their own* door to human fulfillment. . . .” (quoting ROBERT E. RODES, *LAW AND LIBERATION* 214 (1986))).

nion with others for which God created me.⁵² If I walk away, I deny the essence of who I am and of what it means to be human.⁵³

But the question, and potential problem, is whether this framework, which is so explicitly grounded in Catholic theology, is destined to remain an internal discourse just among Catholics or Christians. Here the experience of the religious lawyering movement might be helpful. Remember that what is at stake in the religious lawyering conversation is not just a framework for the interaction of religion and law in professional and social life, but also the struggles of lawyers as people to find personal meaning and integration in their lives.⁵⁴ In this light, to frame the religious lawyering project as one of finding an “overlapping consensus”⁵⁵ is too thin, too reductive, and too impoverished. As a lawyer, I need to make sense of my own work, my own commitments, and my own interactions with clients—all within the particularity of the tradition that I carry within me. Of course I will also need to find a language to express these commitments in a pluralistic society, but I submit that the work of finding language is in many ways a distinct effort.

Might this struggle to find meaning and integrity in legal practice speak to our work in legal theory as well? Might it help us to frame the religious legal theory project as an invitation to push beyond efforts to find an overlapping consensus or a common language?

Why is it that I love listening to my friends of religious traditions different from my own when they explain to me the stories from the *Mishnah* and *Midrash* or from the *Q’ran*? What happens in me when I open my mind and heart to a view of the world and to an analysis of social structures drawn from a tradition not my own? First, it opens me to the person who is sharing the story. One of the reasons that I want to listen to their stories is because I want to understand more deeply the imaginative structures that ground their own commitments. Second, it also opens the doors to my own imagination, helping me to probe more deeply into my own tradition, and perhaps also

⁵² *Centesimus annus*, *supra* note 47, ¶ 41.

⁵³ Cf. SECOND VATICAN COUNCIL, *supra* note 39, ¶ 27 (acts inimical to life and human dignity “do more harm to those who practice them than those who suffer from the injury”).

⁵⁴ See *supra* notes 12–13 and accompanying text.

⁵⁵ See JOHN RAWLS, A THEORY OF JUSTICE 340 (rev. ed., The Belknap Press of Harvard Univ. Press 1999) (1971) (using the term “overlapping consensus” in the context of a discussion of civil disobedience).

challenging my own framework in a healthy and productive way. Legal philosopher Jeremy Waldron captured this dynamic beautifully:

Even if people are exposed in argument to ideas over which they are bound to disagree . . . it does not follow that such exposure is pointless or oppressive. For one thing, it is important for people to be acquainted with the views that others hold. Even more important, however, is the possibility that my own view may be improved, in its subtlety and depth, by exposure to a religion or a metaphysics that I am initially inclined to reject.⁵⁶

Returning to the no-duty-to-rescue example, one could find numerous examples of parallel paths to a similar conclusion. For example, the deontological case for a duty to rescue argues that mutually restraining duties are appropriate because physical integrity is not merely one end, but a requirement and precondition, in the words of Kant, the “basic stuff,”⁵⁷ without which one may not realize one’s ends. As Ernest J. Weinrib summarized:

An individual contemplating his actions from a moral point of view must recognize that all others form their project on a substratum of physical integrity. If he claims the freedom to pursue his projects as a moral right, he cannot as a rational and moral agent deny to others the same freedom.⁵⁸

One could articulate something of an overlapping consensus with the analysis that emerges from the lens of Trinitarian theology, and one could probably trim away the theology-specific footnotes in order to make a palatable point.

But I submit that if our conversations about legal theory are reduced only to these common denominators, we will miss an important opportunity to “thicken” the discourse and, in this case, the “rationality” of protecting the physical integrity of others. In this case, for example, the resources of Trinitarian theology bring into relief a different flavor and a different emphasis—namely that the duty to rescue is grounded not only in the realization that I owe to others the same freedom that I claim, but also in an overarching vision of the other as “a part of me” in which my own fulfillment and happiness

⁵⁶ Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 841–42 (1993).

⁵⁷ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 195 (Cambridge Univ. Press 1996) (1797).

⁵⁸ Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 288 (1980).

hinge on the possibility of building relationships of love and justice with others.⁵⁹

Might my own theological framework be “thickened” by an ongoing discourse with non-theological resources? I do see religious legal theory as journeying on a multilaned highway. For example, in *A Theory of Justice*, John Rawls’s most compelling argument in favor of a duty to rescue was not the Kantian principle that we should help others because we may one day need their help, but rather the horror of living in a society in which no one had the slightest desire to act on the duty to aid, for this would “express an indifference if not disdain for human beings that would make a sense of our own worth impossible.”⁶⁰ Do I understand this analysis more deeply after having spent some time with Trinitarian theology? I think so.

I believe that if we move beyond the effort to find an overlapping consensus or a common language toward a sheer appreciation and enjoyment of simply absorbing and learning from each other’s even very different traditions and points of view, we might be surprised by the depths of the new perspectives and questions that emerge and by the discovery of paths to travel, even together.

III. THEORIZING A SPACE FOR MULTIPLE NARRATIVES

Another reason why I am interested in a more expansive role for integrating religious resources into tort theory is that I am in the process of changing my mind on whether the legal and procedural structure of our current common law system could accommodate a cause of action for failure to rescue—even failure to rescue in an “easy” case which poses no physical threat to the potential rescuer.

What if I come to the conclusion that even the powerful lens of Trinitarian theology would not solve a core procedural and philosophical dilemma, that a “universal duty” is simply too unmanageable for a cause of action in our common law system?⁶¹ What happens if, in spite of the effort to redefine freedom, rationality, and human

⁵⁹ Uellen, *supra* note 36, at 621 (quoting U.S. CONFERENCE OF CATHOLIC BISHOPS, SHARING CATHOLIC SOCIAL TEACHING: CHALLENGES AND DIRECTIONS I (1998)); *see also* PONTIFICAL COUNCIL FOR JUSTICE & PEACE, *supra* note 38, ¶ 35, at 16–17 (“Every person . . . fulfils himself by creating a network of multiple relationships of love, justice and solidarity with other persons while he goes about his various activities in the world.”).

⁶⁰ RAWLS, *supra* note 55, at 298.

⁶¹ *See, e.g.*, James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 901 (1982) (supporting the no-duty-to-rescue rule on procedural rather than substantive grounds).

identity through the lens of Trinitarian theology, I come up with essentially the same result as liberal legal theory: no common-law duty to rescue? If I end up not arguing for a normative change in the law, does looking at the issue through the lens of Trinitarian theology have anything to add to our conversation about the law?

I am still exploring the contours of this idea, but I think it starts with the proposition that the stories we tell about the philosophical moorings of the law do matter—for ourselves, for our students, and for our culture as a whole—and that religious legal theory might be a powerful resource in how we think about these narratives. As discussed above, the philosophical narrative that is generally recounted about the no-duty-to-rescue rule is that our torts system is grounded in a notion of liberty in which the self and others are in fundamental tension.⁶² In fact, the no-duty-to-rescue narratives might even be emblematic of the broader and deeper tensions in our legal system as a whole.⁶³

In this case, religious legal theory might illuminate a space to discuss different narratives about the philosophical moorings of the law in general and specific laws in particular. Is the fact that our common-law system would find it unmanageable to navigate a universal duty to rescue, regardless of a causative link to injury, necessarily grounded in a story about the law's hyper-individualistic emphasis on freedom as autonomy? Perhaps not. One of the contributions that religious legal theory might bring to the overarching discourse is its capacity to illuminate some of the ways in which "law's empire" is limited.⁶⁴ In particular, it could help us to see the ways in which the structure of a cause of action might not tell the whole story about freedom, rationality, and human identity, and it could help explain how our conversations about the law might allow multiple narratives. One of the contributions of religious legal theory might be to point us toward the need for a broader set of resources, including religious and theological resources, to probe more deeply the law's relationship to morality and philosophical meaning.

Our discourse in legal theory often assumes that normative conversations about the law are geared toward affecting or changing the

⁶² See Epstein, *supra* note 33, at 198.

⁶³ For a thoughtful discussion of how the no-duty-to-rescue rule has reflected shifting cultural tides, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 76–98 (1991).

⁶⁴ See RONALD DWORKIN, LAW'S EMPIRE 407–08 (1986) (discussing expansiveness of "law's empire").

norms embedded in the law. The question of whether religious legal theory might pose a challenge to that assumption would merit further exploration as well.

IV. CONCLUSION

A final reason to claim a space beyond totalizing theories, for multiple narratives, is for the sake of our students, who, in “ordinary religion of the law school classroom,” as Dean Roger C. Cramton put it, believe that “[s]ince the lawyer is engaged in the implementation of the values of others . . . he [or she] need not be concerned directly with value questions.”⁶⁵ Law students are not known as risk-takers. Many are convinced that if they take even a few steps off the beaten path, they will be instantly fired, and in the current market, their anxiety is undoubtedly heightened.

So are we stuck? In this regard it might be helpful to focus on another stream within faith traditions: the prophetic role. Even if it seems to rub the wrong way, planting the seeds for alternative perspectives—or even just creating some space for the possibility of such alternatives—might be for our students a precious gift that opens the door to helping them find meaning in their lives as lawyers. We need to expose students to all of the ways in which their lives in the law allow them to engage the whole human experience, including faith perspectives, and to discover the possible paths to an integrity that can fully embrace what they believe, how they see the world, and what they do.

⁶⁵ Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 250 (1978).