

**The “Care Perspective,” American Legal Counselors,
and Reformed Christian Philosophy***

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I. INTRODUCTION

[1] The “Care Perspective” is an analysis that is starting to take hold not just in moral philosophy, theology and bioethics,¹ but also in the practice of law.² It has been applied in

¹ Paul J. Zwier & Dr. Ann B. Hamric, *The Ethics of Care and ReImagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383, n.1 (1996) [hereinafter *Lawyers and Care*].

The “ethic of care” is a broad term encompassing a family of moral reflections which has originated from feminist writings philosophically and from moral psychology empirically. BEAUCHAMP & CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 85 (4th ed. 1994). While there are a number of authors associated with the ethics of care, some feminist writers and some focused in ethics, the writer most associated with the ethic of care is psychologist Carol Gilligan. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). In conducting research on moral development, Gilligan identified a “voice of care” in the deliberations of women struggling with personal ethical dilemmas that contrasted with the dominant tradition in moral development, which was based on the studies of Piaget and Kohlberg. The “voice of care” can be described as a moral perspective or orientation that emphasizes morality in terms of responsibilities of care deriving from attachments to others, whereas Kohlberg’s moral development theory emphasized morality in terms of rights and justice. Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993) [hereinafter Ellmann]. As Gilligan noted,

In defining a shift in perspective that changes the meaning of the key terms of moral discourse--such as the concept of self, the idea of relationship, the notion of responsibility--I described an ethic of care and response that I contrasted with an ethic of justice and rights . . . I describe care and justice as two moral perspectives that organized both thinking and feelings and empower the self to take different kinds of action in public as well as private life.

Carol Gilligan, *Reply to Critics*, in *AN ETHIC OF CARE* 208-09 (Mary J. Larrabee ed., 1993).

² Ellmann, *supra* note 1, at 1; JOSEPH G. ALLEGRETTI, *THE LAWYER’S CALLING, CHRISTIAN FAITH AND LEGAL PRACTICE* 96-109 (1996) [hereinafter *THE LAWYER’S CALLING*].

different areas of law such as the abortion debate,³ torts,⁴ and to corporate law's description of the relationship between managers and their shareholders.⁵ "Care" is a system of analysis that quarrels with the prominent place that autonomy and objectivity hold in much of today's legal problem solving.⁶ Care also quarrels with the presumptions of the adversarial system's competitive and secretive discovery process, as it is at odds with the idea that competition in discovery is the best way to resolve disputes. The care perspective instead asks that the lawyer actually allow for himself or herself to care about the client and let those caring intuitions and feelings play a role in framing solutions to the client's dilemma.

[2] The care perspective has also proved helpful as an analytical model for a better understanding of how one might fulfill his or her calling to be a Christian lawyer within the adversarial system.⁷ The dilemma for many Christian lawyers has been how to balance their obligations to do what their faith calls them to do, and yet serve the autonomous choices of their individual clients. What if their client wants a selfish even sinful solution to their case? The adversarial system encourages each side to focus selfishly on its own rights and needs, which seems to drive the parties apart rather than bring them together in peace. Justice and love seem

³ Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323, 1390 (1995) [hereinafter *Taking Care Seriously*].

⁴ Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

⁵ Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: an Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 478 (1995).

⁶ See *supra* notes and accompanying text.

⁷ THE LAWYER'S CALLING, *supra* note 2, at 100.

to be at odds, and the Christian lawyer is seemingly caught in the middle between advocating for the client's rights and feeling personal conflict with Christ's calling to be a peacemaker. The care perspective creates a decision-making model that provides an alternative to the adversarial model's emphasis on individual autonomy.

[3] One objection shared by both the secular legal profession and Christian theology is that the care perspective is hopelessly naive; that it does not take seriously human tendencies toward selfishness that exist in both the lawyer and client, particularly in the client who has been accused of wrongdoing.⁸ Of course, this objection is one that goes to the essence of human

⁸ Claudia Card, *Caring and Evil*, 5 HYPATIA 101 (1990); Sarah Lucia Hoagland, *Some Concerns About Caring*, 5 HYPATIA 109 (1990); Barbara Houston, *Caring and Exploitation*, 5 HYPATIA 115 (1990); see also Edward A. Dauer & Arthur Allen Leff, *The Lawyer as Friend*, 86 YALE L.J. 573 (1977) [hereinafter Dauer & Leff] (arguing that realism demands of the lawyer something different than caring).

The client comes to a lawyer to be aided when he feels he is being treated, or wishes to treat someone else, not as a whole other person, but (at least in part) as a threat or hindrance to the client's satisfaction in life. The client has fallen, or wishes to thrust someone else, into the impersonal hands of a just and angry bureaucracy. When one desires help in those processes whereby and wherein people are treated as means and not as ends, then one comes to lawyers, to us. Thus, if you feel the need for a trope to express what a lawyer largely is, perhaps this will do: A lawyer is a person who on behalf of some people treats other people the way bureaucracies treat all people--as non people. Most lawyers are free-lance bureaucrats

Id. at 581 (quoted in MONROE FREEDMAN, UNDERSTANDING LAWYER ETHICS 48, (1990)). See generally Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) [hereinafter Postema]; Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 380 (1987) (noting the ambivalence about the role lawyers should play in

capacity to do good. Such an objection is familiar to religious thinkers, reminding them of the early reformers John Calvin and Martin Luther, and the doctrine of the “total depravity” of

society, which reflects deeper cultural contradictions. He says we use law to preserve both individual liberty and social responsibility, and “[w]e use lawyers both to express our longing for a common good, and to express our distaste for collective discipline.” *Id.* at 386. Legal disputes and the profession that choreographs them serve as irritating reminders of the tension between those values. *Id.* at 380-89; Patrick J. Schiltz, *Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998) [hereinafter Schiltz]; Symposium, *Attorney Well-Being in Large Firms: Choices Facing Young Lawyers* 52 VAND. L. REV. 871 (1999) [hereinafter Symposium] (arguing that ethics is a matter of habit, that professional responsibility rules are irrelevant, and that law school is a place to develop the habits of ethical practice).

This paper focuses on the litigator, generally, for a number of reasons. First, on the criminal side, while prosecutors have no real client, they can freely import their own moral sensibilities in their decisions to take or not take cases. The fact that prosecutors are called to some higher standard of fairness suggests there is more to being a lawyer than technical legal analyses. Criminal defense lawyers, while standing more firmly on the code of professional responsibility and its insistence that the state prove its case beyond a reasonable doubt regardless of the guilt or innocence of their client, still must struggle in the gray area of prohibitions against *assisting* a client in a criminal or fraudulent act. They are driven by the need to protect future innocents and their liberty interests. See Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327 (1998).

Civil plaintiffs’ lawyers also have moral dilemmas that are based primarily on whether their client should sue, and whether the client is indeed injured in the way and manner that the client claims. They may be overly incentivized by the customary contingency payment system to prosecute groundless claims, and may be the cause of the civil defense lawyer’s dilemma to defend vigorously their client, to ward off false claims by others. One Michigan plaintiff’s firm is reputed to take a more holistic approach to representation. See Steven Keva, *The Nicest Tough Firm Around*, 85 A.B.A. J. 60 (1999).

Yet the civil defense lawyer is unique in his or her ethical dilemma to balance truth-seeking obligations and not take a position merely to harass, annoy, or delay on the one hand with their client’s right to a zealous technical defense of their economic interests on the other.

human kind. The reformers, seeing plenty of sin and evil, even in the institutional church, taught that a person's will and reason are both essentially corrupted by innate egoism. That was the meaning of the doctrine of total depravity. "It embraced the depravity both of human reason and of human will--including the reason and will of the ecclesiastical hierarchy."⁹ In this paper I have taken Calvin's doctrines seriously, and trace how neo-Calvinists--those who hold beliefs in the sinful nature of man and in the sovereignty of a loving God--might respond to the question of whether the care perspective might play a valuable role in educating lawyers in the practice of law. The analysis is quite surprising in that the care perspective is very compatible with a Christian Biblical understanding of the heart and how the heart of humankind is capable of doing good and knowing God's will. The conclusion reached is that the care perspective takes sin seriously, yet counsels the lawyer to subjectively engage in counseling the client, to the end that a more comprehensive and particularized solution can result.

[4] Yet one might ask, why should we trouble ourselves with the religious philosophy when we are attempting to build counseling and decision-making models for lawyers? First, it is surprising how pervasive religious beliefs about the inherently sinful nature of human kind are as an underpinning of the American adversarial system. Understanding these beliefs in their religious context informs any movement that seeks to change the way things are presently done and the likely reaction to the changes. Second, whether lawyers should be in the business of handing out something more than a legal risk assessment, and venture wisdom or moral advice is

⁹ Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1573, 1581-82 (1989) [hereinafter Berman & Witte].

a question of continuing, vital importance.¹⁰ Religious philosophers--especially those who stand outside the Puritan Calvinist traditions, which hold closely to principles that advocate obeying civil law because it "comes from God"--have developed extensive scholarship that debates the human capacity for being altruistic and informs any debate about the ethics of care.¹¹

Contemporary legal educators who struggle with these issues have largely ignored these

¹⁰ Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 731 nn.1-3 (1997) (citing Murray L. Schwartz, *Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978)); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 544 (1983); William H. Simon, *The Ideology of Advocacy, Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 34-35 (1978); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 7 (1988) (relying on Schwartz's principles as the basis for a normative evaluation of the adversarial system); cf. ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); Postema, *supra* note 8; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991). See generally MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 13 (1990); Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 120 (1990) (reviewing LUBAN, *supra*); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986); Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 (1984).

¹¹ George M. Marsden, *Introduction, Reformed and American*, 1-11 in *DUTCH REFORMED THEOLOGY: REFORMED THEOLOGY IN AMERICA* (David F. Wells ed., 1989) [hereinafter Marsden]. Of course, to a great extent, moral philosophers who had the greatest affect on western democracies were religious philosophers in today's terms. Descartes, Rousseau, Hobbes, Smith, Kant, and Hegel are just a few philosophers whose religious perspective was pervasive in their ideas about the nature of man. See *FROM MODERNISM TO POST MODERNISM: AN ANTHOLOGY* (Lawrence Cahoon ed., 1996). See generally KEITH E. YANDELL, *GOD, MAN, AND RELIGION: READINGS IN THE PHILOSOPHY OF RELIGION*, Part 3 (1973).

thinkers.¹² This paper argues that understanding this religious philosophy, and how it contrasts with the mostly unstated faith based assumptions made by the adversarial system, is instructive to legal educators who build lawyer counseling models that provide for the lawyer's expression of the moral/religious values of lawyers/counselors and the clients they counsel.¹³

II. THE CONTEMPORARY DEBATE CONCERNING THE CAPACITY OF LAWYERS TO BE MORAL, DO GOOD, AND IMPART WISDOM

[5] First, a brief word about the contemporary debate in secular legal education; there are basically three different answers that modern legal commentators give to the question of whether lawyers can or ought to express wisdom or their own religious/moral perspective when counseling a client. One view is optimistic about the ability of lawyers to give moral advice; another is pessimistic; and the third view is unspecific about the content of the lawyer's advice, but urges attempts at a "caring dialogue" with the client.¹⁴

¹² Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U.L. REV. 385, 391 (1992) [hereinafter Menkel-Meadow] (arguing that the religious discussion is not helpful); *cf.* Postema, *supra* note 8, at 55 (arguing for a "special friendship" model for imparting practical wisdom based in Aristotle and moral philosophy).

¹³ See James F. Bresnahan, *Ethical Theory and Professional Responsibility: Possible Contributions of Religious Ethics to Dialog About Professional Ethics of Attorneys*, 37 JURIST 56 (1977) (I agree with Bresnahan that this dialog between religious ethics and lawyers does not mean that the religious perspective is *necessarily* better, as a matter of logic. Bresnahan claims only that it provides a different perspective that complements the lawyers professional thinking and makes it more comprehensive. *Id.* at 63.); Schiltz, *supra* note 8; Symposium, *supra* note 8 (calling on law schools to teach lawyers the habits of acting ethically).

¹⁴ The optimistic/pessimistic dichotomy relates to a philosopher/commentator's perspective on the nature of humankind to do good. See Menkel-Meadow, *supra*

[6] One optimist, Anthony Kronman, argues that the client needs “practical wisdom” and that the lawyer should be trained to impart practical wisdom in the model of a “statesman.”¹⁵

Professor David Wilkins points out the value-laden nature of Kronman’s understanding of “statesman” as follows:

Kronman argues that the element of the lawyer-statesman ideal in

note 12, at 391. Menkel-Meadow lists Thomas Hobbes, Niccolo Machiavelli, Sigmund Freud as pessimists; Karl Marx, Erich Fromm, and Karl Rogers as optimists; and Adam Smith as holding contradictory beliefs. Menkel-Meadow, herself, refuses to choose a side. *Id.*; see David Wilkins, *Practical Wisdom For Practicing Lawyers: Separating Ideals From Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 461 (1994) (book review) [hereinafter Wilkins].

¹⁵ ANTHONY KRONMAN, *THE LOST LAWYER: THE FAILING IDEALS OF THE LEGAL PROFESSION* (1993) [hereinafter KRONMAN]; see Menkel-Meadow, *supra* note 12, at 391. In addition, the Model Rules of Professional Responsibility do give some authority for the lawyer to have a moral conversation with the client. Model Rule 2.1 provides that a lawyer as advisor “may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” MODEL CODE OF PROF’L RESPONSIBILITY R. 2.1 (2001). Religious beliefs are not explicitly referenced.

Whether the commentators agree, I have learned that partners in major law firms understand that it is their role to impart more than technical legal advice, if not “practical wisdom” to their clients. For example, I conduct training programs for lawyers at Jones Day Reavis & Pogue, Morgan Lewis & Bochiuss, as well as at other public programs. Partners in these firms express the opinions that it is upon the lawyer’s move from associate to partner that the client comes to see them as a source for more than technical legal advice, and sees them more as a friend. In addition, Taylor Reveley III, at one time managing partner at Hunton & Williams, a 600 member firm in Richmond, Virginia, insists that the President’s lawyers must not have known that Clinton had an affair with Lewinski. His opinion is that any responsible lawyer gives to any client in serious trouble more than just technical legal advice. He argues that the lawyer is a source of experience about what effects disputes have on businesses and how to minimize those effects. In other words, the lawyer necessarily deals with more than the short-term financial picture of the client in trouble, but must and should talk about broader client goals and values. He made these comments to an earlier presentation of these ideas given to the St. James Society, November 10, 1998.

greatest jeopardy is a lawyer's ability to help clients deliberate about the ends of legal representation "in any but instrumental terms." The ideal of the lawyer-statesman, he asserts, rejects the notion that a lawyer is a "deferential servant" whose only responsibility "is to prepare the way for ends that others have set." Instead, lawyers "must deliberate, for and with their clients, about the wisdom of their clients ends." Kronman contends that, to deliberate effectively, lawyers must understand that these "ends" will frequently present a clash among "incommensurable values" – by which Kronman means values that cannot be placed on a common scale without "abstract[ing] from . . . the special features [about the various ends] that are of greatest significance to the parties themselves." When such a clash occurs, "a rational choice among [competing ends] cannot be made on calculative or other grounds" and the resulting choice will therefore be "groundless." The essence of the lawyer-statesman's practical wisdom, Kronman contends, lies in the ability to reach wise decisions in circumstances of this kind.¹⁶

[7] The pessimist sees an inevitable self-interest and bias creeping into lawyers' advice whenever it attempts to be more than instrumental.¹⁷ Pessimists argue that if morality is not left

¹⁶ Wilkins, *supra* note 14, at 461 (internal citations omitted); *see also* Postema, *supra* note 8, at 63 (identifying Montaigne as one of the first pessimists).

¹⁷ Dauer & Leff, *supra* note 8, at 573; Camille A. Gear, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 *YALE L. J.* 2473 (1998) [hereinafter Gear]. Gear proposes an ethical mirror model that is different from the "friendship model" of Simon, Cochran, and Shaffer because it better avoids ethical domination. *See also* Clarence H. Faust & Thomas H. Johnson, *Introduction* to JONATHAN EDWARDS, lxxii-xcvi (1962) [hereinafter EDWARDS] (introducing selective writings of Jonathan Edwards, discussing Hobbes, Mandeville, and Hutchinson's views of the selfishness of man and Edward's simultaneously held belief in the total depravity of man and God's grace).

See generally JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985) [hereinafter *HERACLES' BOW*]. "As for his choice of means, Odysseus' attention to probability and improbability, to costs and benefits, locates the authority for that choice outside the self, in the world, for the only question is what will work best. Such a mind cannot constitute a self." *Id.* at 21. What it does constitute is a conception of the person as acquisitive. *See generally* JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN*

to the client, the lawyer will use his or her persuasive ability to skew the outcome in the lawyer's own self-interest.¹⁸ The pessimist argues that the optimist is hard pressed to describe the basis

LITERATURE, LAW AND POLITICS (1994); HERACLES' BOW, *supra*; JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY (1984). It is difficult to describe White's work because the work is itself a performance of "constitutive rhetoric," especially his most recent efforts. Also, he writes against theoretical description. Nonetheless, in earlier work, White described "constitutive rhetoric" as

a set of resources for claiming, resisting, and declaring significance. It is a way of asking and responding to questions; of defining roles and positions from which, and voices with which, to speak; of creating and maintaining relations; of justifying and explaining actions and inactions. It is one of the forms in which a culture lives and changes, drawing connections in special ways between past and present, near and far. The law . . . is a system of meaning; it is a language and should be evaluated as such.

HERACLES' BOW, *supra*, at 205.

¹⁸ RICHARD L. ABEL, AMERICAN LAWYERS 112-26 (1989); *see* Wilkins, *supra* note 14, at 464. Wilkins finds that "early" Kronman was a pessimist. *Id.* at 458-59. Wilkins reviews Kronman's book and concludes,

Instead, [of Kronman's assertions, that there is no moral basis to advocacy, or that society should depend on the judgment of the lawyer statesmen,] lawyers must actually deliberate *with* the lay public about the justifications for and limitations on zealous advocacy. This deliberation must take place both at the policymaking level and in the day-to-day interactions among lawyers, clients, state officials, and other concerned citizens. Although this process is bound to be fraught with difficulties and frustrations, those lawyers who choose to participate will have the satisfaction of knowing that they have helped to shape a new set of professional ideals that are as good for society as they are for lawyers.

Id. at 476.

upon which the lawyer will urge his or her values onto the client. Better to stick with the values inherent in the legal system.¹⁹ The individual client should have the ultimate say within the system. Otherwise, lawyers are likely to respond to the unpopular, disruptive challenges of minorities and the poor with the advice, “just go away.”²⁰

[8] The optimist’s rejoinder is that the pessimist must admit that the lawyer’s advice cannot be amoral or without some set of values.²¹ At best, the values that control a lawyer’s advice are those inherent in the advocacy system itself and the rules of law that govern the dispute.²² In fact, the legal system’s values may be an elaborate cover for the self-interest of the lawyer. After all, if the legal system’s values are all about “making the indeterminate, determinate, the incalculable, calculable, the incomparable, comparable, by assumptions it makes about the role of the lawyers, decision makers and law, in resolving disputes,”²³ then the law only pretends moral certainty, and the lawyer can really say anything and predict any outcome

Wilkins then sees a compromise position that I will try to get to through neo-Calvinism.

¹⁹ Wilkins, *supra* note 14, at 471.

²⁰ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 52, 106-10, 292-95 (1976).

²¹ Postema, *supra* note 8, at 75-76. Postema quotes from Yeats, who warned that “once one makes a thing subject to reason, as distinguished from impulse, one plays with it, even a very serious thing.” *Id.* at 76. Postema says “that artificial reason of professional morality, which rests on claims of specialized knowledge and specialized analytical technique, and which is removed from the rich resources of moral sentiment and shared moral experience in the community, tempts the professional to distort even the most serious of moral questions.” *Id.*

²² Wilkins, *supra* note 14, at 464.

²³ *Id.* at 471.

that serves the lawyer's purposes. The advocacy system only pretends that an adversarial public dispute resolution model that puts its faith in the autonomy of the individual litigant can answer the moral dilemmas faced by society.

[9] The pessimist also has trouble defending why an adversarial process will necessarily produce the best results, either for the individuals involved or for society as a whole.²⁴ And the process seems very inefficient in even the most routine situations. Will not the pessimist move the client to take a purely selfish view; one that maximizes individual freedom for the client without regard to the less immediate and visible costs to the client's relationships or to society? And is it in the lawyer's self-interest to do so? And so, under a pessimist's model we end up creating a selfishness effect times two.

[10] A third answer, and the better one, is for the lawyer to focus not so much on the content of the advice that the client needs, but that the lawyer and client should be in a "moral dialogue" about the values imbedded in the decision the client must make.²⁵ As I and others have argued elsewhere, the lawyer should partner with the client and question whether the client wants to use, or give values other than those inherent in the adversarial system, a chance to operate in resolving the dispute.²⁶ Does the client want to save relationships despite the fact that

²⁴ Postema, *supra* note 8, at 79.

²⁵ Gear, *supra* note 17; Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); *Lawyers & Care*, *supra* note 1; THE LAWYERS CALLING, *supra* note 2; *see also* Postema, *supra* note 8, at 83 (describing a "recourse role" for the lawyer where a lawyer "cannot consider himself simply a legal technician, since his role essentially involves the exercise of his *engaged* moral judgment").

²⁶ Wilkins, *supra* note 14, at 476. Wilkins, who I have labeled a pessimist, argues that dialogue over the values of the professional advocate must not merely exist at

the legislative level, but also with the individual client. And Kronman also seems to agree. He articulates not simply a substitution of the lawyer's values for the client, but a dialogue. Wilkins again captures Kronman's thinking.

Kronman grounds his model for deliberating about incommensurable ends in an analogy to personal decision making. When faced with an identity-defining choice between incommensurable ends, a person exercising practical wisdom will attempt to experience each alternative from the inside, while at the same time preserving sufficient distance between his present point of view and those of the alternatives before him" to be able "to pass judgment on their merits." Although this process cannot produce an objectively "best" outcome, it nevertheless fosters a deeper self-knowledge and a sense of internal cohesion--which Kronman calls "integrity" --that ultimately "represents the greatest good a soul can hope to have."

Id. at 461-62.

Wilkins' beliefs are similar to the work of James Boyd White. See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Art of Cultural and Communal Life*, 52 MICH. L. REV. 684 (1985). Jack Sammons writes of White's Michigan law review article,

In that article he saw constitutive rhetoric as a response to a mechanistic understanding of law, not unlike that we have seen above in the *Technician*. White's claim for constitutive rhetoric is that we are formed by the way in which we speak. In conversation we decide who we are and what kind of people we are to be. Thus, the "we" that is the "we" of the lawyer's rhetorical world is the community created through a particular form of discourse. There are ties to skepticism in "constitutive rhetoric" because the initial orientation, the initial openness, is premised on a skeptical attitude towards morality--one in which all claims are potentially valid. But White's is not a skeptic's approach. There is no thought here of the quietitude into which the true skeptics fall; there is just the opposite, for White's rhetoric endorses an ongoing and disturbing conversation as a moral enterprise.

Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L.J. 1, 46

his or her individual freedom may be compromised? Does the client feel responsible despite the fact that the law says he or she is not responsible until a jury says so? And how does this particular client answer the question, “what is fair toward all the parties concerned?” By entering into a caring dialogue, some argue that a more genuine, authentic, and wise result will be reached, even where the decision is, as Kronman says, incalculable or groundless. The wisdom does not come from the lawyer, but comes from and in the dialogue--those expressions of heartfelt longings and intuitions of both lawyer and client. Knowing what is the right thing to do will emerge from this dialogue.

III. THE CARE PERSPECTIVE²⁷

(1995) [hereinafter Sammons].

I will return to Kronman’s point at the end of this article. *See also* Ellmann, *supra* note 1; Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65 (1994); *Lawyers & Care*, *supra* note 1; Carrie Menkel-Meadow, *Portia Redux: Another look at Gender, Feminism, and Legal Ethics*, 75 VA. J. SOC. POL’Y & L. 94 (1994).

²⁷ I have argued more fully in another setting that any counselor, whether in psychology, medicine, or in the church, is in a position to draw the “one cared for” into a dialogue that truly seeks to “regenerate the human heart” and orient one’s perspective to the care and nurture of human relationships. What is true for the counselor in these other spheres is also true for the lawyer. I admitted to the anecdotal and unscientific nature of the first argument that was used, but it was born out of personal experience that I believe has led to the working of a care perspective in individuals’ lives in individual circumstances. I have learned to describe what went on in the language of the care perspective. *See Lawyers & Care*, *supra* note 1; Paul J. Zwier, *Looking for a Nonlegal Process: Physician Assisted Suicide and the Care Perspective*, 30 U. RICH. L. REV. 199 (1996) (applying a care perspective to the problem of physician assisted suicide); *see also* Gear, *supra* note 17 (arguing from experience the benefits of using a “mirroring” counseling model in counseling clients).

[11] It is important to understand the nature of the care perspective and its benefits.²⁸ The

In an earlier collaboration with Ann Hamric, an ethicist who works in the medical arena, we asserted that in certain cases, the counselor will provide a more holistic and particularistic approach that will result in better decisions if he or she uses a care perspective rather than what we describe as the prevailing ethic in law. In essence, we looked to the nursing profession for a secular view of care and compassion. See *Lawyers & Care*, *supra* note 1, at 433. Thomas Shaffer has suggested a similar argument for a "family client" in the estate-planning context. Shaffer finds problems with a lawyer seeing a family as the client because the Model Rules of Professional Responsibility prohibit a lawyer taking two clients who are in a conflict of interest situation. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987). Shaffer rejects this legal ethic of radical individualism as "sad, corrupting, and untruthful." *Id.* at 970. He argues that "this one-lawyer-for-each-person way of first seeing a moral quandary in this situation and then resolving the quandary with the ethics of autonomy (the ethics of aloneness) leaves the family out of the account." *Id.* "A truthful description[,however,] is that the lawyer's employer is a family." *Id.* Indeed, the family is an "organic community," *id.* at 979, which is "prior to individuality." *Id.* at 971.

To illustrate the family as an "organic community," Shaffer uses author Anne Tyler's metaphor of "a magnifying glass all cracked and broken" that makes "broken things" appear "whole again." In Tyler's cracked magnifying glass, even when physically alone, "all of us live [] in a sort of web, criss-crossed by strings of love and need and worry." *Id.* at 966.

²⁸ See Ann Hamric, *Using the Care Perspective in Case Analysis* (article in preparation, on file with author) [hereinafter Hamric]; *Taking Care Seriously*, *supra* note 3, at 1390; cites *supra* note 1. Judges writes

Noddings argues that moral philosophy's reliance on traditional Kantian criteria of universality and objectivity "has led to a serious imbalance in moral discussion." The universals of Noddings's ethic are attitudinal and motivational rather than behavioral. "[A]n ethic of caring locates morality primarily in the pre-act consciousness" of the one who cares. Caring and relatedness thus are desirable ends in themselves; caring is not an *obligation* that one must discharge to achieve morality. To the contrary, "[w]e want to be *moral* in order to remain in the caring relation and to enhance the ideal of ourselves" as persons who care. Morality under this view derives from a natural desire to

care perspective is described as a moral orientation and a mode of moral thinking that stands in contrast to the “justice orientation.” A succinct description comes from A. L. Carse. Carse says that according to Gilligan,

the justice orientation construes the moral point of view as [1] an impartial point of view, [2] which understands particular moral judgments as derived from abstract and universal principles, [3] which sees moral judgment as essentially dispassionate rather than passionate, and [4] it emphasizes individual rights and norms of

become and to remain related, which gradually unfolds in a succession of caring relations. Such relations allow “identity-conferring commitments,” that: reveal personal integrity; provide the sense that one’s life has meaning, foundation, and a place in the community; and elicit the values of patience, trust, and a moderation of manipulative striving.

While the caring relation is the ethical ideal, even when the empathic connection is strong and a motivation to act naturally arises the individual can choose whether to accept and act upon or to reject that feeling. Furthermore, in some personal encounters such sentiments either do not arise naturally at all or do so only faintly and are displaced by other feelings such as hostility or revulsion. In such cases an individual may summon motivation from remembrance of his or her own natural caring and being cared for, to take care of his or her ethical self. Noddings refers to this process as “ethical caring.”

An ethic of care thus “is a natural derivative of the desire to be related. It springs from our experience of caring and the inevitable assessment of this relation as “good.” What we seek in caring is not payment or reciprocity in kind but the special reciprocity that connotes completion.” This ethic of care leads to self-fulfillment; it does not require self-sacrifice on the altar of abstract altruistic ideal. Moreover, the roles of caring and being cared for are neither static nor predetermined, but shift over time and between persons.

Id. at 1389-92. A caring attitude is not enough, though; there must be connection.

formal equality and reciprocity in modeling our moral relationships. By contrast, the care orientation [1] rejects impartiality as an essential mark of the moral, [2] understands moral judgments as situation-attuned perceptions sensitive to others' needs and to the dynamics of particular relationships, [3] construes moral reasoning as involving empathy and concern, and [4] emphasizes norms of responsiveness and responsibility in our relationships with others.²⁹

[12] What then would a decision-making process that is modeled on care look like, and how would such a process resist the constraints that arise from the role-playing hierarchical model? An individual approaching a legal situation using the care perspective would proceed as follows. First, the professional care provider or legal counselor would gather information and identify which factors are relevant to the analysis. This requirement goes beyond the usual rights-based methodology in requiring salient features of the context to be identified as well as the individual's perceptions of the events.

[13] The lawyer, for example, who counsels a President by doing an economic analysis of the risks of getting caught, will fail to get at the deeper values that are at stake. In the context of counseling a President, the care perspective would require not only an understanding of whether he did what others accused him of, his chances of getting caught, and possible economic consequences of the jury decision, but also the facts about his obligations to the country, his place in history, and his relationship with his wife and what understanding, if any, they had reached. It would also take into account any information a President's children, friends, and advisors may have. In this process of information gathering, the lawyer should not be judgmental or dismissive of the rightness or wrongness of what the client has done. At this stage

²⁹ A. L. Carse, *The "Voice of Care": Implications for Bioethical Education*, 16 J. MED. & PHIL. 5, 6 (1991).

the lawyer needs to care enough to make sure that the client is not deluding himself, or assuming that he can make it go away by denying what happened. In addition, the lawyer must learn the meaning that the client ascribes to his life and his relationships.

[14] Second, the care provider/counselor would identify the persons involved in interdependent relationships in this situation. For the counselor, this step disallows a narrow focus on the particular person who came to see him or her. For the legal practitioner, it violates an exclusive focus on the client. All persons' opinions that are in significant relationships with the one cared for are to be considered.

[15] It is through this very simple step--a change in focus from being solely concerned with the client, to raising empathetic concerns of others in relationships with the one cared for--that a paradigm shift can occur. Teaching a client empathy, or even love for neighbors as self is begun by this shift in focus. One wonders if former President Bill Clinton might have seen a different outcome to his celebrated legal difficulties if he had been asked, "All right, now who is going to be affected by this decision, and should we get them involved if they are going to be affected?"

[16] For the large companies and institutions accused of civil wrongdoing, examining the companies' relationships produces a similar broadening of perspective. Of course, the corporate client has to think about its obligation to its shareholders. Obviously corporate law has an impact here, and may limit the lawyer's obligation to the shareholders alone. Yet others have proposed that the lawyer's counseling of the client is greatly enriched by using a care perspective, and that everyone is much better served thereby.³⁰ If the manager considers

³⁰ Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation*:

obligations to employees, to the community in which they live, to the consumers, and to the state, then the company may see itself clear to break out of its legalistic, defense oriented mode, and consider broader notions of fairness and justice. Asking what care demands of the decision maker in all of its varied relationships, frees the client from the role of the zero sum game. It allows for more creative solutions that are slightly more particularized to the business in its community, and presented in light of its responsibilities to its various constituencies. The care perspective also makes the claim that the lawyer's opinion should be frankly and directly expressed because the lawyer is also in a significant relationship by virtue of his or her involvement with the client.³¹

[17] The third step of the decision-making process is the most radical. It identifies the central issue of care, asking what caring demands in this particular situation with these particular persons to strengthen (or at least maintain) the primary relationships and to avoid hurt and harm.³² This step can only be taken after identifying the interdependent parties and their primary

An Inquiry Into the Causes of Corporate Immorality, 73 TEX. L. REV. 477, 478 (1995).

³¹ *Lawyers & Care*, *supra* note 1.

³² *Id.* at 401-05. Maude Pervere has argued that what lawyers need to be taught is advanced empathy. She led a workshop for program directors with the National Institute for Trial Advocacy in teaching empathy as a foundation of ethical counseling. She has also incorporated sections on listening and empathy into portions of a negotiation seminar that she teaches at Stanford.

Teaching empathy, or what moral philosophers have in the past also called sympathy, is basic to humanity. It is the business of philosophy. According to Ellen Singer More, although frequently traced to the work of Sigmund Freud, empathy originated within the field of aesthetics. Robert Vischer, the German philosopher of aesthetics, coined the word in 1872. Vischer was trying to understand the process by which a work of art can call forth an emotional

relationships. One then considers the view of both the one cared for (in the legal context, this is the client) and the ones caring (this includes family, friends who are in a caring relation with the client, and all those directly affected by the decisions).

[18] These steps provide for a unique subjectivity that the care perspective requires. It allows for the moral self to express itself. It necessitates a true understanding of and reflection upon the feelings of others and yet it does not assign the moral responsibility for the decision to one individual. The role taken by the care provider/lawyer is more like that of a facilitator for the discussion, or a consensus builder, rather than a problem solver.

[19] Fourth, the care provider/counselor and the one cared for should discuss and think through all possible alternative activities to determine which are responsible, i.e. loving and just, to those who are involved in the situation. They should ask how the action would affect each person's life, including their shared life together. The view of the care provider/counselor arises from this attempt to enter into and understand the context of the situation. The care provider/counselor enters the situation and participates as one caring, whose view is to be communicated to the parties involved and carefully considered. Again, any actions proposed and the consequences of proposed alternatives are evaluated in terms of whether they are loving and just for the individuals and their shared life.³³

[20] Finally, the involved parties jointly should select an alternative from those deemed

response from the observer, a momentary fusion of subject and object. The term he chose, *Einfühlung* ("feeling into," as contrasted with sympathy or "feeling with"), was translated into English in 1897 as "empathy." Ellen Singer More, *Empathy Enters the Profession*, in *THE EMPATHIC PRACTITIONER: EMPATHY, GENDER, AND MEDICINE*, (Ellen Singer More & Maureen A. Milligan eds. 1994).

³³ Hamric, *supra* note 28.

acceptable, anticipate objections and answer them, and devise a workable plan for carrying out the proposed solution.³⁴ After the decision is carried out, it is also helpful to evaluate its adequacy.

[21] The optimistic belief imbedded in the care perspective is that during this dialogue the right thing to do will emerge. Lawyer and client will simply know it because it is the most comprehensive and particularized solution, but also, at least partly, because it feels right. By asking the client to focus on doing the “caring thing” the client will draw on his or her whole person, not just the rational objective self, to determine to do what is the caring thing.³⁵ Thus, in some ways, the care perspective depends on circular reasoning. It argues that clients will answer the question, “why should I do the caring or moral thing?” with “because I am or want to be a caring or moral person.” Noddings says,

At every level, in every situation, there are decisions to be made, and we are free to affirm or to reject the impulse to care. But our relatedness, our apprehension of happiness or misery in others, comes through immediately. We may reject what we feel, what we see clearly, but at the risk of separation not only from others but from our ideal selves.³⁶

[22] The lawyer as counselor is then taught how to empathize with the client, and in turn

³⁴ As a possible final step, the counselor might consider drafting an agreement that can memorialize the solutions the parties agree upon. Yet such a process suggests bargaining over the rights and duties of the parties. At least one commentator feels that bargaining is not a useful tool and is antithetical to a care perspective. See Annette Baier, *Trust and Antitrust*, 96 ETHICS 231 (1986) (criticizing contractarians because they ignore the costs to relationships from adversarial self interested bargaining).

³⁵ NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 35-37 (1984).

³⁶ *Id.* at 51.

the client is taught how to empathize with those who they are in relationship with. Are they taught how to love? Have they been taught compassion? Have they learned how to care?³⁷ Or have clients instead been manipulated to adopt the lawyer's values, and forego their rights to maximize their own freedom on their own terms? These are the questions the care perspective

³⁷ *Id.* at 182. Professor Sammons seems to agree. He argues that the lawyer who sees his or her role as a "rhetorician with integrity," will necessarily engage in the same careful dialogue. Sammons uses the fictional example of a lawyer counseling Antigone, a character of Greek mythology, and writes,

After listening, the next lawyerly task is to prepare to speak for Antigone, or, when we understand that what we truly do as rhetoricians is re-present our client to others, to prepare to speak Antigone. Thus, as one who must speak persuasively for another and seeks to do this well, Antigone's lawyer has no choice but to explore with her who she is and what it means to be who she is in this dispute in these communities with these values. In this conversation with the client, the rhetorician discovers and creates--creates because the conversation will change the client--who the client is and what is to be said for her. To see if the wisdom he heard in the story she brought to him is her wisdom and to see if it will be persuasive to the relevant others, the lawyer tests this wisdom against who Antigone is, against who she seems to be becoming in the conversation, against her culture as best he can, and against the morality of the communities in which the dispute must be heard. Sometimes clients' moral claims will be very demanding upon others and upon communities, as Antigone's certainly would be. And sometimes the moral claims upon our clients from others will be the same. From this we see how Shaffer and Cochran's [referring to Thomas Shaffer and Robert Cochran's, *Moral Responsibilities*] consideration of justice and mercy (and the forgiveness I wish they had talked about) become part of the stuff of which good moral counseling as a rhetorician consists. The lawyer as rhetorician talks about these with her client because such is the nature of the conversation of disputes.

Sammons, *supra* note 26, at 49.

will still need to answer in order to satisfy the pessimist. And yet it should be clear that these are questions that relate to beliefs about the nature of humans and their capacity to do good; questions long struggled over by theologians and religious philosophers, but that none-the-less have real implication for the practicing lawyer.

[23] For example, after laying out for the client (1) a risk analysis of “getting caught,” (analytically playing with language; for example, whether a person was “alone” with someone, or engaged in “improper” sexual relationships, or whether there is “evidence” that smoking “causes” lung cancer) and (2) the technical legal arguments in favor of the client (for example, definitional rationalizations about the meaning of perjury, or of attorney/client privilege to protect turning over internal documents), the lawyer using the care perspective would not only explore with the client the underlying values buried in the client’s decision, but would attempt to impart wisdom. But, indeed, what is the caring and fair thing to do? After restating the way the client sees the case, should the lawyer describe how the lawyer sees it, in all its religious and moral context? If the lawyer believes that the client is making a serious mistake, should the lawyer express this? And, finally, is Clinton or the tobacco executive likely to value this advice, heed it; or instead, inevitably scoff at the lawyer’s beliefs and values--at least those not couched in the language of the law, economics, or utilitarianism?

[24] And so we need to ask whether a moral dialogue is sufficient for a lawyer with a particular religious perspective, a Christian world-and-life view. We can identify the main objection to the care perspective in both the secular area and in Reformed Christianity as being a belief based objection; that a care perspective is hopelessly naive because humans are inherently selfish, sinful and evil, and that it is useless for one person to try to talk another person out of

taking anything but a narrow, solely self-interested view of what a person should do. This objection supports the technical rationalistic arguments typically made on behalf of defendants in civil cases.

[25] The main body of what follows will attempt to give theological/philosophical answers to this objection--originating in a surprising place, in the thinking and confessions inspired by John Calvin, who some have argued first stressed the sinful nature of humans, in his call for reform of the Christian church.³⁸ I will extract a number of “Calvinist Principles” for critiquing the care perspective from Calvin and his heirs. In addition to total depravity of church, government, reason, and the individual, they include the sovereignty of God, the love of God, the role of the heart as the seat of knowing.

[26] After taking a look at Calvin’s description of the doctrines of the sovereignty of God and the total depravity but before getting into the modern iterations of these doctrines, I will look more closely at why rationalistic arguments fail by using the work of epistemologist Alvin Plantinga. I will then contrast Puritan Calvinism by examining a number of Dutch neo-Calvinists; a politician, a legal philosopher, and a religious philosopher, who debate the religious problem of evil and propose philosophical and theological responses that are consistent with

³⁸ WILLIAM J. BOUWSMA, JOHN CALVIN, A SIXTEENTH CENTURY PORTRAIT 32-65 (1988). Early reformers put Calvin’s stress on sin into expression in their confessions. See THE HEIDELBERG CATECHISM, *Questions and Answers* 3-11 (1563). Question and answer 8 reads, “[b]ut are we so perverted that we are altogether unable to do good and prone to do evil? A. Yes, unless we are born again through the Spirit of God.” See also THE STATE, JUSTICE, AND THE COMMON GOOD: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY 29-51 (B. J. Diggs ed., 1974) (describing the doctrine of the “total depravity;” the foundation of the pessimist’s belief about the sinfulness of human institutions and the need for a new radical individualism).

basic principles of Calvin's thinking.

[27] Applying their religious philosophy to the contemporary debate produces some interesting lessons. It teaches the requisite humility both to the "humanistic lawyer," who has put faith in reason as the sole governing force in a person's life, and to the lawyer of faith, who may be tempted to think he or she has some exclusive knowledge of truth. And in the end, these thinkers provide support to and hope for the lawyer who engages in a caring dialogue; that such a dialogue will more likely produce a wiser, more caring decision than if the lawyer concerns himself or herself only with the technical legal argument.

IV. THE "TOTAL DEPRAVITY" OBJECTION, JOHN CALVIN, AND THE CARE PERSPECTIVE

[28] In taking a look again at the pessimist's objection to optimistic suggestions that lawyers impart practical wisdom to their clients, it is apparent that these objections apply just as well to the care perspective. Wilkins, for example, argues that history is the prime authority, and it is replete with examples of human oppression and misuse of power. How will a caring dialog keep the lawyer from manipulating the client to the lawyer's advantage? Will the financial pressures on the big firm defense lawyer squeeze out the ability of the lawyer to give wise statesman-like advice? To Wilkins, two things will inevitably follow if a lawyer is given permission to express his or her moral views. The lawyer will become self-interested (even if not explicitly so), and will inevitably counsel and persuade the client to take a point of view that is consistent with the lawyer's own self-interest.³⁹ Often this interest continues the power of the

³⁹ Jonathan Edwards would say that this is inherent in what it means to be human, that man can only be motivated by self-love. See EDWARDS, *supra* note 17, at

haves over the have-nots and protects the status quo.⁴⁰

[29] While the practical financial influences are important reasons to distrust the lawyer's advice, there is a deeper skepticism that Wilkins expresses concerning his lack of faith in human nature, and a preferred faith in the rationalistic, individualistic values of the American adversarial system.⁴¹ There is a skepticism that operates at two levels: both at the ability of the lawyer to be altruistic and caring, and at the client's ability to seek aims other than their narrowly-defined self-interests. How does one answer these objections, objections that are founded in a fundamental lack of faith in human nature: that individual lawyers and clients cannot be trusted to make caring decisions because they are inherently sinful and overwhelmingly self-interested by nature? One way to start to look at these questions is by taking the religious nature of the question seriously.⁴² By religious nature, I mean what beliefs

lxxxiii. Yet Edwards also saw a role for the affections which played on the heart. *Id.* at xxxi.

⁴⁰ Wilkins, *supra* note 14, at 458.

⁴¹ See also Menkel-Meadow, *supra* note 12, at 399-400 (finding it unhelpful to identify the source of belief with religion but arguing that our altruistic beliefs are formed by socializations and educational systems that mediate against classic assumptions of rational self-interested behavior. Yet this ignores how much of American thinking is shaped by its religious heritage).

⁴² I am not alone in giving the word "religion" a very broad definition. In the field of bioethics, contemporary commentators have done the same. EDMUND D. PELLEGRINO AND DAVID C. THOMASMA, *HELPING AND HEALING: RELIGIOUS COMMITMENT IN HEALTH CARE* 7-8 (1997); see, e.g., KARL BARTH, *THE THEOLOGY OF SCHLEIERMACHER* 253 (1982). These questions are "religious" because they are based on non-rational reasoning. Paul J. Zwier, *God, Man, and Jury*, 1989 UTAH L. REV. 433, 435 (1989). And for the religious lawyer, there is no escaping them. Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference: The Legal Ethics Perspective*, 66 FORDHAM L. REV. 1253 (1998). I agree with Professor Griffin when she says,

or faith principles the lawyer/advice-giver may have about the nature of humans and their capacity to do good. Western Christianity has long been the teacher of the doctrine of the pervasive sinfulness of humankind, and intricately tied to U.S. cultural distrust of the state and American belief in the need for radical autonomy that supports the adversarial system.⁴³ If the

I think the predominant way--to understand the role of religion in the lawyer's life; the believer confronts her religious/moral and her legal/moral obligations and seeks to reconcile the two.

Such a focus puts the spotlight on the individual believer, as much writing about "religious legal ethics" has done. This individual may detect some conflict between her religious commitments and the requirements of the legal profession. For example, one central concern of critics--not only religious critics--of legal ethics has been that this professional ethics might compel the attorney to act--or to omit to act--in a way that violates his fundamental moral convictions. Classic "role morality" critics have asked if the law, with, for example, its adversarial system of justice and its profession-specific moral norms--including special duties of confidentiality and neutrality--requires attorneys to violate what Alan Donagan called the norms of "common morality." A fortiori could religious believers, who might espouse a morality they view as higher than, or superior to, mere "common" morality, disparage or renounce a profession that requires them to violate their religious/moral convictions. If religions commit their adherents to a morality, while legal ethics obliges its practitioners to its own distinctive morality (or amorality), then we could expect religion to play some role in the individual lawyer's decisions about the practice of law.

Id. at 1255-56 (internal citations omitted).

⁴³ B. J. Diggs, *The Classical Philosophy of the Modern State*, in *THE STATE, JUSTICE, AND THE COMMON GOOD: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY* (B.J. Diggs ed., 1974); *SOURCES OF THE AMERICAN MIND: A COLLECTION OF DOCUMENTS AND TEXTS IN AMERICAN INTELLECTUAL HISTORY, CHAPTERS ON WINTHROP-CALHOUN* (Loren Baritz ed., 1966). See generally CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 51-109 (1973) (tracing the understanding of law as a response to the sinfulness of

objection is a religious objection, because it concerns a belief about the nature of human kind and the ability or capability to do good, it is important to take care to understand the complete package of religious beliefs from which the doctrine of total depravity comes.

[30] Some have argued that the extreme anxiety of John Calvin is the source in western Christianity for the prominence of the belief in the sinfulness of man. Calvin scholar, William Bouwsma, writes as follows about Calvin's view of his world.

Like the prophets, Calvin was particularly distressed by what he perceived as a steady erosion of the sense of community, visible at every level of society. Contemporary princes, he believed were unusually lacking in consideration for their peoples, and wars were longer and more brutal. Alms in this "unhappy age" were only given "contemptuously." Young people had lost that deference to their elders on which social order depends, and they rejected all correction. Sexual offenses, "rapes, adulteries, incests, and seductions," were more common than ever before. "How monstrous," he exclaimed, "that the world should have been overshadowed by such dense clouds for the last three or four centuries, so that it could not see clearly" how to obey Christ's commandment to love our enemies! Everything was in "shameful confusion;" everywhere he saw only "perfidy, cruelty, plots, frauds, violence, injustice, shamelessness," while the poor "groan under their oppression and the innocent are arrogantly and outrageously harassed." God seemed asleep.⁴⁴

[31] To Calvin, history demonstrated man's disobedience, inherent selfishness and the self-interest of man. Calvin's thinking, though, was shaped by more than his knowledge of history and his time. He also understood scripture to describe Adam's fall from grace, and when Adam fell, all humans fell with him. And so not only are individuals sinful, but also in that fall

individuals and institutions, in the thinking of Hobbes, Hume, Bentham, Locke, and Montesque, the latter two thinkers whose writing gave birth to Constitutional forms of government).

⁴⁴ WILLIAM J. BOUWSMA, JOHN CALVIN, A SIXTEENTH CENTURY PORTRAIT 64 (1988) [hereinafter BOUWSMA].

is the fall of all creation. Encompassed in the doctrine of total depravity of man is a belief that the state, the church, and all of human institutions are “out of joint,” and this belief is behind Calvin’s call for reform.⁴⁵ Consequently, the doctrine that pervades much of western Christianity’s thinking about the need for government, separation of powers, and checks and balances, may be tied, in intellectual history, to Calvin and other reformers’ beliefs in the inherently corrupt and sinful nature of man.⁴⁶

A. Reason is Not A Sufficient Curb to Sin

[32] Calvin’s answer to the problem of evil was a mixture of humanism and mysticism.⁴⁷ He argued that reason and moderation were keys to taming the natural impulses, emotions, and instincts that would otherwise call man into sin.⁴⁸ Yet reason alone was never sufficient. It was only through the saving grace of God that man was capable of doing good. Calvin’s writing describes the paradox of the pervasiveness of sin and the sovereignty of God, leaving his followers to work out in a more careful and systematic way whether to be ultimately optimistic or pessimistic in their dealings with others.⁴⁹

[33] While Calvin agreed with Erasmus that elements of truth are present in pagan thought, and while he appreciated their value and acknowledged God Himself as their *primum*

⁴⁵ *Id.* at 55-56.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 86.

⁴⁹ *Id.*

patieae fontem, for Calvin these moments of truth are only possible because of God's common grace, which does not destroy but curtails and retards the effects of original sin.⁵⁰ Sin has dimmed our eyes to such an extent we cannot even see the clear manifestation of God's glory in the structure of the world,⁵¹ the *revelatio generalis*. Scripture, as the *revelatio specialis*, serves as a pair of spectacles to enable us to recover our lost perceptions. Calvin likened scripture to a torch or a sun. He compared scripture with the rudimentary truths that heathen science and

⁵⁰ A.L. CONRADIE, THE NEO-CALVINISTIC CONCEPT OF PHILOSOPHY 4 (1960) [hereinafter CONRADIE].

⁵¹ Dooyeweerd, with Kuyper, must reckon with sin.

Man as normal knows God's law. Man as fallen is abnormal. In our abnormal condition, our immediate communion with God is lost, sin has brought separation and darkness. As Calvin points out, this need for Scriptural revelation does not rest in *ratiocination*, but on the immediate testimony of the Holy Spirit, the *testimonium Spiritus Sancti*.

Id. at 16 (emphasis added).

If we accept the latter point of view, then all life, which includes the life of thought, is affected by original sin and must be regenerated by God's special grace. Kuyper describes the radical fashion in which sin influences intellectual activity as follows: (1) corresponding to the abnormal condition of the universe, falsehood in every sense of the word is now prevalent. This particularly affects those sciences that depend upon personal communication. (2) Except for actual falsehood, we have the unintentional mistake, in observation and memory as well as in the actual processes of thought from which follows, (3) self-delusion and self-deception, making true self-knowledge impossible. (4) Because of the abnormal condition of our imagination, the boundary between fantasy and reality becomes blurred. In some the imagination works weakly, in others it is over excited. (5) The abnormal element in the condition of other minds affects. The power of education, language and the spirit of the time cannot be resisted. (6) The effects worked by sin on the body deserve equal consideration. No one is in a normal bodily condition and our spiritual disposition is consequently affected. (7) The different parts of the content of our consciousness affect and contaminate each other. Thus evil indefinitely multiplies. *Id.* at 16-17.

philosophy can attain by means of the *gratia communis* by saying they appear only as sparks. Self-knowledge then teaches us about our own ignorance and wickedness, and turns the mind to God as the source of all perfection and wisdom. Of course one cannot penetrate the essence of God by reflection and reason. It is only in bowing to the authority of scripture, in humility, that one can attain self-knowledge.⁵² Still, the acceptance of scripture cannot be dissociated from the accompanying virtues of humility, true piety, and religion, which are gifts of the Holy Spirit. So while Calvin breaks with the optimistic rationalism of the Renaissance and contemporaneous Humanism, according to which man himself is the source and norm of all truth, he also argued that God accommodated Himself to human weakness to make Himself known.⁵³ So is Calvin an optimist or a pessimist concerning the ability of humans to do good?

[34] Here western Christianity has long struggled, but it is the thinking of a group of Dutch neo-Calvinists⁵⁴ that is particularly important for answering this religious objection.

⁵² *Id.* at 17.

⁵³ BOUWSMA, *supra* note 44, at 125.

⁵⁴ For the reader who is unfamiliar with “neo-Calvinism” it is important to stop and place neo-Calvinism in the broader context of reformed Christianity. For the purposes of this article I have adopted one of George Marsden’s definitions of reformed.

“Reformed” has numerous differing connotations A major purpose of this essay is to cut through the bewildering confusion of the many meanings of “Reformed” by reducing the categories to the three major Reformed emphases that have flourished in the American cultural setting [Orthodox Presbyterians] meant by “Reformed” strict adherence to Christian doctrine as contained in the infallible Scriptures and defined by the standards of the Westminster Assembly Other factors were important to Christian life, especially a proper emphasis on the law of God as the central

These neo-Calvinists give a religious and philosophical answer that may also be key to an understanding not only why and how a care perspective may be vital to the imparting of practical wisdom from lawyer to client, and in understanding how a client may think altruistically, but also to understanding how “religious” faith (whether in God or in reason) and client counseling may be able to coexist.

[35] If Calvin were alive today he might ask the defenders of the care perspective, how does the care perspective combat the pervasiveness of sin in both individuals and institutions? Clearly, he would say that you may not rely on the “passions.” These feelings are too susceptible to base human desires. Human decision-making needs to be moderated by reason

organizing principle in the Westminster formulations
[The progressive wing of the conservative Christian Reformed Church says] that a “Reformed” Christian is one who has a certain view of the relationship of Christianity to culture. She or he must affirm the lordship of Christ over all reality, see Christian principles as applicable to all areas of life, and view every calling as sacred. [For some] “Reformed” must be understood in the framework of being “evangelical.” “Evangelical” . . . basically refers to anyone who promotes proclamation of the gospel of salvation through the atoning work of Christ and has a traditional high view of Scripture alone as authority.

Marsden, *supra* note 11, at 2.

As I have discussed, I take as my definition of reformed the second meaning that Marsden uses above. This definition equates with neo-Calvinism, so I will drop the additional label of reformed and just use neo-Calvinist. For a discussion of neo-Calvinism see also CONRADIE, *supra* note 50, at v-vi, describing neo-Calvinism as a philosophical construct of Kuyper, Dooyeweerd, and Vollehoven. Conradie is one of the first to examine Dooyeweerd’s writing and help make it accessible to English readers. I rely heavily on Conradie for my understanding of Dooyeweerd’s thought.

and disciplined by scripture.⁵⁵ And while there is a role for the affections of the heart in knowing God's will,⁵⁶ how will the care perspective provide for the affections without perverting the discussion into some secular humanistic discussion? And how also can any good come apart from Christ? For, "[i]f we wish to be his disciples, we must unlearn everything we have learned apart from Christ."⁵⁷ Finally, Calvin might say, you lawyers must concern yourself with law. And the law should be obeyed, unless to obey would be contrary to God's will. How then does the "care perspective" respond to these questions? Can it respond by appealing to Calvinism, itself?

B. Contrasting Neo-Calvinism v. Puritan Calvinism

[36] Before getting to today's Calvinist moral philosophy we need first contrast it with Puritan Calvinism that was so much a part of the early colonial experience.⁵⁸ Puritan theology shares the same starting point with the neo-Calvinist--the sovereignty of God--but the end result is quite dissimilar in that the Puritans understood their political covenant quite differently than do the neo-Calvinists. Puritans equated civil law with the law of God. Through their idea of a political covenant, Puritan views of covenant may be the genesis of the high place that civil law takes in our society today. The Puritans thought Calvin's concept of God's sovereignty was related to God's covenant with his people, and can be contrasted with the more modern

⁵⁵ BOUWSMA, *supra* note 44, at 86.

⁵⁶ *Id.* at 157.

⁵⁷ *Id.* at 98.

⁵⁸ See James D. Bratt, *The Dutch Schools*, in *DUTCH REFORMED THEOLOGY: REFORMED THEOLOGY IN AMERICA* (David F. Wells ed., 1989).

emphases of the meaning of God's sovereignty.⁵⁹

[37] John Witte explains the covenant emphasis in the Puritan Calvinist view as follows,

The political covenant was a tri-party agreement between God, the civil ruler, and the people. God, the Puritans believed, had called the civil authority to be His vice-regent in the world, to reflect and represent His majesty and authority, to appropriate and apply His will and law. The civil ruler was to lead the people by his example and direct them by his law to fulfill their great task under the national covenant. He was to exemplify godly justice and mercy, discipline and benevolence. His rules and laws were to prescribe virtue and proscribe vice, to protect Christian values and beliefs and punish immorality and apostasy. They were to bridle sinful discord, and to arouse the people to godly order and discipline. By the political covenant, the civil ruler had vowed to God and to the people to accept these charges. The people, in turn, had vowed to the civil ruler and to God to oblige and submit to the civil ruler, to accept and respect his civil laws.

This political covenant, the Puritans believed, rendered the people and the civil ruler co-responsible for each other's obligations to God and man. The civil ruler was required to compel the people to perform their obligations under the national covenant. If the people failed, the civil ruler could reprimand them; if they persisted in their delinquency, he could banish or execute them

Such an understanding of the political covenant helps to explain the Puritans' passionate concern for law and politics in the seventeenth century. The political covenant ultimately made them responsible for the law and politics of the realm. They were to ensure that the civil ruler was a godly ruler and that the civil law reflected divine law and instituted godly order, discipline, and reform.⁶⁰

⁵⁹ John Witte, Jr., *Blest be the Ties that Bind: Covenant and Community in Puritan Thought*, 36 EMORY L.J. 579 (1987) [hereinafter Witte].

⁶⁰ *Id.* at 592-94. Witte explains further,

The Puritan doctrine of covenant was based on three novel propositions: first, that the covenant of works is God's "special constitution" for mankind by which man's purpose in the world is prescribed, his rights and duties towards God and his neighbor are defined, and moral, political, and social

values and principles are established; second, that the covenant of grace is a bargained contract, voluntarily formed by God and his elect, and absolutely binding on both parties; and, third, that through the Bible God illumines the provisions of the covenant of works and illustrates the many forms of the covenant of grace. Taken together, these propositions radically altered and expanded traditional theological ideas of covenant.

This new covenant doctrine became an organizing principle of Puritan thought.

First, the doctrine produced a new synthesis of Puritan theology. It preserved the traditional Protestant teaching of an incomprehensible, omnipotent God. Yet it emphasized his revealed will and self-imposed obligations to man. It maintained the great reformed doctrines of human depravity and justification by faith alone. Yet it made man a partner with God and his work a fulfillment of God's providential plan. It affirmed the Calvinist doctrine of divine. Yet it accorded new importance to human volition and human action. It continued to distinguish between law and gospel, between the Old Testament and the New. Yet it regarded both law and gospel as essential instruments of grace, both the Old Testament and the New as indispensable chapters in the drama of redemption. The great doctrines of earlier Lutheran and Calvinist reformers were, therefore, retained, but they were cast in a new ensemble, with new meanings, new emphases, and new applications.

Second, the doctrine of covenant unified the Puritans' concepts of the individual and of the community. Earlier Protestant writers had vacillated between nominalist theories of man that focused on the nature of the individual, to the exclusion of the community, and realist theories of man that focused on the nature of the community, to the exclusion of the individual. Puritan writers shifted the focus of inquiry to the nature of the covenant and thus found a place in their theory of man for both the individual and the community. Each individual, the Puritans believed, was created by God and was bound to Him by covenant. Each individual was called to fulfill his divine telos or calling in the world, to serve as God's co-worker, to account for himself on the day of

judgment. But God had also created man as a communal being. He had commanded him to love and serve his neighbor, to join with him in a variety of associations. The Puritans differentiated at least four such covenantal associations -- the nation, the state, the church, and the family. Each of these associations, they believed, though given positive form by man, was, nonetheless, created by God. Each was bound by covenant to God. Each was called to fulfill a divine mandate, to serve a divine purpose or office. The nation was called to be an image of God's kingdom, to preserve and propagate godly beliefs and values, to adopt and advocate godly morals and mores, to arouse all individuals to godly obedience. The state was called to reflect and represent God's authority and rule, to appropriate and apply His law, to compel the whole nation and each of its members to fulfill their covenantal calling. The church was called to preach the Word, to administer the sacraments, to attend to the destitute and the afflicted, to instruct the people on the requirements of God's law, and, if necessary, to admonish and discipline them. The family was called to beget and raise children, to inculcate within them love of God and neighbor, to teach them respect and submission to law and authority. A pluralism of associations was thus formed, each with a unique calling from God, each with a special responsibility to the individual.

Third, the doctrine of covenant unified the Puritans' concepts of freedom and of obligation. Every person, the Puritans believed, was created with the freedom of will to choose those obligations which he wished to assume. Whether such obligations involved ultimate or trivial matters, whether the obligatory conduct was prescribed or self-determined, each person was free to accept or decline such obligations. Once having accepted, however, a person was bound to perform that obligation, regardless of the consequences. This insistence on the absolute bindingness of voluntary obligations was based on two premises. First, to breach any obligation, however trivial, was to violate one's covenant of grace with God. It was to sin before God, to fail in one's love and service to one's neighbor, to fall short of the example of Christ's faithfulness which Scripture requires man to emulate. Second, to break one's obligation was ultimately also to violate the covenant of works or covenant of nature. It was to fall short of the principles of honor, discipline, and diligence

[38] In contrast, seeing a potential for sin in even avowedly Christian institutions, neo-Calvinism places much less emphasis on the civil authority and God's covenant with any one people. Instead it tries to claim the sovereignty of God in individual decision-making. It mistrusts the government to be an instrument of God's will. It is skeptical of the state's ability to get it right. It looks much more at the individual's responsibility to seek God's will.

[39] To explain the more recent Calvinist perspective one must start with a clear understanding of how sin and selfishness pervades ethical normative decision-making. In other words, why not rely on man's reason, and reason alone, to moderate the human passions towards the self? After all, the enlightenment taught the power and potential of man's reason to discover more about the world and to civilize it. To understand clearly the failures of rationalism, we need look at how events in history gave birth to a renewed Calvinist epistemology and see how systems that depend on rationality, coherence, reasonableness, and logic will inevitably fail.

V. TAKING THE SOVEREIGNTY OF GOD AND SIN SERIOUSLY: QUESTIONS FOR CRITIQUING CARE

A. Why the Rational is Insufficient for Epistemological True Belief

[40] Of course, here we enter the arena of applied philosophy of law: the obligation to do the law, or God's will, and how you determine what it is.⁶¹

set forth in this covenant. It was also to destroy the communal order, calculability, and harmony provided by this covenant.

Id. at 598-600.

⁶¹ Alvin Plantinga, an analytic Christian philosopher, who shares Calvinistic premises, aids in understanding the sovereignty of God and the sinful nature of man. Known initially for his work titled *God and Other Minds*, where he

[41] Religious philosophical critique of Reason is devastating. Critiques of rationalistic systems of knowing remind us of the problems in any rationalistic system of knowing. There are three prominent rationalistic systems for determining whether a belief has positive epistemic status and each system has demonstrable failings. These are internalism, coherentism, and reliabilism; systems familiar to practicing lawyers--if not by these names--for analyzing what a client truly knows and whether some belief should be given positive epistemic status.

[42] The internalist sees positive epistemic status as a matter of *aptness* of epistemic *duty fulfillment*. A proposition A is beyond reasonable doubt for a person at a time *t*, for example, if at that time it is more reasonable for him to accept that proposition than to withhold it; A has some presumption in its favor for him at *t* if accepting it then is more reasonable than accepting its negation.⁶² Epistemic reasonability could be understood in terms of the general requirement to try to have the largest possible set of logically independent beliefs that is such that the true beliefs outnumber the false beliefs.⁶³ Reasonability is a *normative* concept; more precisely, it

presented a transworld depravity version of the Free Will Defense, a modal ontological argument, and an argument for the direct justification of theistic beliefs, Plantinga has most recently drawn further attention for his trenchant analysis of what it means for a person to know, or warrant that something is true. And it is in this writing that I find a clearer expression of how “sin” can enter into a legal discussion with a client as to whether they ought to take responsibility for the harm that has been caused. It also informs our discussion of how a person will know, or be drawn to do what is right, or to what he calls ascribing “positive epistemic status” to any belief. And again, where he comes out resonates with the care perspective. ANALYTIC THEIST: AN ALVIN PLANTINGA READER, xi (James F. Sennett ed., 1998) [hereinafter PLANTINGA READER].

⁶² *Id.* at 181.

⁶³ *Id.*

pertains to requirement, duty, or obligation.⁶⁴

[43] Reasonability, as a normative concept, that is part of a definition of positive epistemic status is deeply flawed because it is not sufficient for positive epistemic status.⁶⁵ First, a definition: a proposition A that has little by way of positive epistemic status, is nonetheless such that believing it is maximally apt for epistemic duty fulfillment for a person.⁶⁶

[44] Let us try the internalist's analysis of an executive's decision whether to settle a lawsuit. Let us say that this executive is driven to do the reasonable thing, as defined by the internalist's definition of reasonable, and, the following has been his experience: whenever his company has been sued, he has had a sensory reaction of nervousness and anxiety. Additionally, over the years, in hundreds of lawsuits against the company, he has the same sensory reaction and is then vindicated in court.

[45] Now he is sued again, (let us say the defendant is a tobacco company, because a smoker claims that cigarette smoking caused his lung cancer). The tobacco company executive client experiences the tell tale nervousness and anxiety. He identifies that his nervousness and anxiety is an indication that his company will be vindicated. Reasonable right? After all, it has been the case every time in the past. To him, he is reasonable in associating his anxiety with his belief about what he should do, and he may see it as his duty to act reasonably in this regard. Yet his belief cannot have positive epistemic status merely as a matter of aptness for the fulfillment of epistemic duty or obligation. It does not take into account knowing whether

⁶⁴ *Id.*

⁶⁵ *Id.* at 182.

⁶⁶ *Id.*

cigarette smoking does in fact cause lung cancer, and did in fact cause this smokers lung cancer.

[46] A deconstruction of knowing, that something has positive epistemic status is familiar to the practicing lawyer, but with a twist. The deconstruction of belief is first turned on the plaintiff's accusation that the defendant is responsible. The lawyer inquires of the potentially responsible client about how one knows that this plaintiff's injury is caused by defendant's product. Of course the belief cannot be given positive epistemic status as a matter of the internal logic of the accuser's experience. Then the lawyer who wants to get the defendant off might try appealing to the client's internalist bias. Indeed, the lawyer may ask whether the client and/or the institution intended to cause harm in selling their product to consumers. (This presupposes one can ever answer the following question: What does it mean to say that an institution intended harm?) The lawyer then reminds the client that most times when the client does not intend harm, the harm is not fairly attributed to the client. He argues that since the actor did not intend harm, the actor cannot know that he caused this harm. Based on a duty to act reasonably, the client can be drawn to believe his selfish version of the facts by knowing he is right even though his belief may not have positive epistemic status.

[47] But perhaps, true belief is related to effort.⁶⁷ Yet again, even where the executive works particularly hard at being rational and denies any role for his feelings of anxiety, and with great effort, in the face of ridicule from others, feels it is his obligation to only do what is rational, and believes that smoking causes lung cancer only when a jury tells him so, effort in and of itself has little to do with whether his belief about the relationship between smoking and

⁶⁷ *Id.* at 183.

cancer is true or not.⁶⁸ Yet this is exactly the legalistic, rationalistic argument implicit in every client's position to defend against the client's responsibility for causing some harm. The lawyer's question will always be, well, how do we know rationally whether your actions or product caused the plaintiff's injury? No internal system can create a positive epistemic status for your belief. This is especially so, where you are feeling responsible. Let me teach you how that feeling of responsibility does not produce positive epistemic status for your belief. In fact, your belief is insufficient for knowing what is the truth.

[48] Is it then any wonder that a lawyer can argue from the premise of a duty to act reasonably that her client does not know what happened, much less if she is responsible. Arguing from a duty to act reasonably is an insufficient analytic exercise since it will never guarantee that a belief reaches positive epistemic status.⁶⁹

[49] Next we look at *coherence*: perhaps all that is relevant to my beliefs having positive epistemic status for me is a certain internal relationship among them--that they are coherent.⁷⁰ But, again, Plantinga shows that this is not so.⁷¹ Imagine our tobacco executive who believes that lawsuits brought by smokers are groundless strike suits. Imagine further that unbeknownst to anyone, the executive is overtaken by fixation disease from exposure to too much radiation.

⁶⁸ *Id.* Plantinga's argument is a version of an old question--how do I know I am not now dreaming, or that I dreamt my earlier experience, which generated my reason for believing a particular causal relationship? As a matter of analytic philosophy, you do not. So one can always question the reasonableness of the reasons given for believing a causal relationship to exist.

⁶⁹ Plantinga's point is also troublesome for the care perspective. If the care perspective bases positive epistemic status of belief on feelings, it will also fail.

⁷⁰ PLANTINGA READER, *supra* note 61, at 183-84.

⁷¹ *Id.*

He becomes fixed in his beliefs. In other words, coherence fails because it assumes that his faculties are functioning properly. Yet coherence does not depend on proper functioning; it tries to define positive epistemic status merely by coherence.⁷² Despite the change in facts, he has become fixed in his belief and the principle of coherence would not tell him otherwise.⁷³ And the reverse is true when analyzing the plaintiff's claim. How do I know that the plaintiff is functioning properly when he or she claims injury from my product? Maybe the plaintiff is a blamer and always blames others for the harm he experiences, or maybe he is only imagining his harm. How can I ever know as a matter of internal consistency?

[50] Finally, what about reliabilism, the last of the three chief contemporary ideas as to the nature of positive epistemic status?⁷⁴ According to reliabilism, we implicitly think of positive epistemic status as involving our faculties functioning properly; that a belief has positive epistemic status if and only if it is produced by a reliable belief-producing mechanism or process; and the degree of its positive epistemic status is determined by the degree of reliability of the process that produces it.⁷⁵ Alvin Goldman gives us perhaps the best statement of reliabilism: "The justificational status of a belief," Goldman says, "is a function of the reliability of the process or processes that cause it, where (as a first approximation) reliability consists in the tendency of a process to produce beliefs that are true rather than false."⁷⁶

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 184-85.

⁷⁵ *Id.*

⁷⁶ *Id.* at 184-85.

[51] The problem with reliabilism, however, is the “dreaded problem of generality.”⁷⁷ To understand the problem of generality we first need to make a type/token distinction for belief forming processes. A belief forming process token is a specific, dated sequence of events that results in a belief. A belief forming type is a kind of belief-forming process token. To Feldman, reliability is a property of process types, so that it is the reliability of the process type responsible for a belief that determines its justification. However, the specific process token that leads to any belief will always be an instance of many process types. Feldman says, for example, the process token leading to my current belief that it is sunny today is an instance of all the following types: the perceptual process, the visual process, the processes that occur on Wednesday, processes that lead to true beliefs, etc. These process types are never equally reliable.

[52] But perhaps, if relevant types are characterized very narrowly then the relevant type for some or all process tokens will have only one instance (namely, that token itself). If that token leads to a true belief, then its relevant type is completely reliable, and according to reliability theory, the belief it produces is justified. This is plainly unacceptable and has the absurd consequence (in the extreme case, where every relevant type has only one instance) that all true beliefs are justified and all false beliefs are unjustified. We can say that characterizing

⁷⁷ *Id.* at 185 (citing Richard Feldman, *Reliability and Justification*, 68 THE MONIST No. 2, at 159ff (Apr. 1985)); *see also* Richard Foley, *What’s Wrong with Reliabilism*, 68 THE MONIST No. 2, at 188-200 (Apr. 1985) (Foley is pessimistic about whether reliability can ever be a sufficient basis for determining whether a belief is true); Ernest Sosa, *Knowledge and Intellectual Virtue*, 68 THE MONIST No. 2, at 226, 243 (Apr. 1985) (describing a “subject grounded” ability to tell truth from error, which is called “intellectual virtue.” (Plantinga describes a similar grounding of true beliefs in a person functioning as he was “designed” to function. PLANTINGA READER, *supra* note 61, at 185)).

relevant types too narrowly leads to The Single Case Problem.

[53] On the other hand, a very broad account of relevant types of belief-forming process leads to what we may call the No-Distinction Problem. This arises when the beliefs of obviously different epistemic status are produced by tokens that are of the same (broad) relevant type. For example, if the relevant type for every case of inferring were the type inferring, the reliability theory would have the unacceptable consequence that the conclusions of all inferences are equally well justified (or unjustified) because they are believed as a result of process of the same relevant type. Or, if one said I know because of a visual process; because I saw it, and the visual process is said to be reliable, it would mean if some one saw a flying saucer, then it must be reliable. This is clearly not so.

[54] To make reliability theory plausible, some other way must be found to specify processes, some way that assures that only reliable processes operate in cases in which one's evidence supports a belief adequately, and only unreliable processes operate when one's evidence fails to support a belief. Yet, as one tries to specify the processes, one becomes subject to the problem of too narrowly defining the process: the consequence is The Single Case Problem.

[55] In addition to the problem of generality, we need to heed the warning that what it means to say that a process is *functioning* properly is problematic. It may be that the chief executive thinks that a jury system is functioning properly in not awarding damages brought by smokers. But is the jury functioning properly? Or are they only *accidentally* producing decisions that the executive finds reliable? This question can be asked of any scientific system or other system of knowing. Does the system produce positive epistemic status for a belief, or is

the system only accidentally producing such beliefs.⁷⁸

[56] Plantinga gives the following example.

Suppose I am struck by a burst of cosmic rays, resulting in the following unfortunate malfunction: whenever I hear the word “prime” in any context, I form a belief, with respect to one of the first 1000 natural numbers that it is not prime. So you say “Pacific Palisades is a prime residential area,” or “Prime rib is my favorite,” or “First you must prime the pump,” or “(17) entails (14),” or “The prime rate is dropping again,” or anything else in which the word occurs, in each case I form a belief with respect to a randomly selected natural number that it is not prime. This belief-producing process or mechanism is indeed reliable, for in the vast majority of cases it produces truth. But it is only accidentally reliable; it just happens, by virtue of a piece of epistemic serendipity, to produce mostly true beliefs.⁷⁹

[57] From a theistic perspective, that positive epistemic status accrues to a belief *B* for a person *S* only if *S*'s cognitive environment is appropriate for his cognitive faculties and only if those faculties are functioning properly in producing this belief in him--only if his cognitive faculties are functioning properly in the way God designed human cognitive faculties to function, and only if *S* is in the sort of cognitive environment for which human cognitive faculties are designed. Additionally, under these conditions the degree of positive epistemic status enjoyed by *B* is proportional to the strength of his inclination to accept *B*.⁸⁰ In other words:

A's belief *B* has positive epistemic status for *S* if and only if that belief is produced by *S* by his epistemic faculties working properly (in an appropriate environment); and *B* has more positive epistemic

⁷⁸ PLANTINGA READER, *supra* note 61, at 184.

⁷⁹ *Id.* at 186.

⁸⁰ *Id.* at 185-86.

status that B^* for S and either B^* does not or else S is more strongly inclined to believe B than B^* . Still another way to put the matter: a belief B has degree d of positive epistemic status for a person S if and only if the faculties relevant to producing B in S are functioning properly (in an appropriate environment), and S is inclined to degree d to believe B .⁸¹

[58] What this shows is that *any* system that depends on “rationality,” defined as “reasonability,” “reliability,” or “coherence,” is fatally flawed.⁸² We need to be careful here, to

⁸¹ *Id.* at 186.

⁸² And what modern epistemology has meant in the world of law is that fact-finding has been left to a political process, one that gives the authority for finding facts to a jury. But why, the lawyer asks, even where a jury has found liability, should you trust a jury to determine what truth is? After all, even the scientific method, which has produced some wonderful theories over the years, knows nothing, at least by its own standard of empiricism. Is the world flat or round? What is the smallest particle of matter? Is it solid, or better described by string theory, as a flow of energy? Science cannot say.

Let us take a legal causation issue, for example. Let us take epidemiology and apply it to the question of whether smoking causes lung cancer in a particular person. What does science tell us? It tells us that there is a statistical correlation between smoking and a greater incidence of lung cancer. Yet we also know that only one out of ten smokers get lung cancer. Now, many of these smoker die from other illnesses. All certainly die. But why is it that not all smokers get lung cancer if smoking causes lung cancer? It must be that smoking only increases the probability that one gets lung cancer. But what else might account for the fact that a person gets lung cancer. It could be genetically related. It could be that the person was exposed to some cosmic burst of radiation. It could be any number of things the person is exposed to in their environment, from exhaust from cars, to breathing toxic substances at work. How can epidemiology ever tell us what caused cancer in a particular person. It cannot. According to a rationalistic system, an expert’s belief that smoking causes cancer in a particular person is fatally flawed.

Maybe we can do a reduction analysis. Yet even then, the best a scientist would ever be able to say is that there is a probability that a person’s smoking caused his lung cancer. According to the philosopher/lawyer, this requires trusting the scientist, the scientist’s method of doing reduction analysis, and that the historical facts will continue in the future. (Maybe there is an evolutionary process at work

admit that there is still much work for the Christian philosopher yet to do. Yet the most important question posed apropos to our discussion is familiar.

Our spiritual forebears at Princeton used to speak of the *noetic effects of sin*. Clearly (from a Christian perspective) sin has had an important effect upon the function of our cognitive faculties; but just how does this work and how does it bear on specific questions about the degrees of positive epistemic status, I believe, makes it much easier to understand the degree of positive epistemic status enjoyed by moral beliefs and apriori beliefs; but just what sort of account is correct here?⁸³

[59] The important point is that a theistic process, one based on faith in some one, or some thing, or some value, because of some nonrational reason, is the underlying basis for the ability to claim it as a true belief. And the options seem to be the following: I will rely only on how I define self-interest, to fill in the gaps where logic fails; or I believe I have been designed in a way that requires me to know God's will, and I will seek that will instead of relying on my own wisdom. There are necessary nonrational ways of knowing that are essential to any belief having positive epistemic status. And this position is consistent with a Calvinist description of a regenerative heart; that God's act of creating humans in his image and designing them to know and make choices is somehow inherent and necessary to being and knowing. Additionally, an understanding of the human heart's role, in its religious sense, is crucial to a belief's attaining positive epistemic status, even when sin is pervasive.

and smokers who get cancer die off and their children have health problems that kill them off before have children, so smokers who do not get lung cancer will survive and be unaffected by lung cancer.) In other words, the facts maybe changing as the science is being conducted. How do we know that the scientific method is functioning properly to either tell us what happened in the past, or what will happen in the future?

⁸³ PLANTINGA READER, *supra* note 61, at 186.

[60] If what is necessary for a belief to rise to the level of being a true belief is that the person who is telling us about his belief is functioning properly, or the way God created him to function, then a dialog would seem to be an important instrument for one person to assess whether another person is functioning properly. But what will guide the dialog and how does the one person, for example a lawyer, guide another person, for example the client, to finally form true beliefs? And what will it mean to say that the heart, as designed by a creator God, will enable a person to know both the facts and what is the right thing to do?

[61] There is more help in twentieth century Christian philosophy.⁸⁴

B. Locating Knowing in the Heart, not the Head⁸⁵

[62] According to some Christian philosopher/theologians who claim to be followers of John Calvin,⁸⁶ to be Christian, one has to recognize the Lordship of Christ over all areas of life,

⁸⁴ It must be noted that there is no such thing as a consistent philosophy that was articulated by John Calvin. Nor is there a Reformation philosophy, as we now understand the word philosophy. Yet what Kuyper described in his Stone lectures at Princeton, was what he understood as a philosophy that was consistent with Calvin's articulation of the sovereignty of God and the saving work of Jesus Christ. CONRADIE, *supra* note 50, at 7-9.

⁸⁵ *See id.* at 1-35 (providing an excellent overview of the history of Neo-Calvinism).

⁸⁶ To start to understand neo-Calvinism and its implications for the ethics of care, one key figure is Dooyeweerd; yet it is necessary to take Kuyper and Herman Dooyeweerd, almost simultaneously, because of their affect on each other. Dooyeweerd (1894-1959) worked through and after the heyday of Abraham Kuyper's attempt to create a Christian government that ran a secular state, the Netherlands. Kuyper and his party ruled the Netherlands from 1901-1905. Moreover, Kuyper's political influence spanned a much broader period: for instance, he was instrumental in starting the Free University in 1880. The Free University was and is free of state control, yet funded by state tax revenues. It attempted to study science, philosophy, sociology, mathematics, history, and law

which meant that one could neither dismiss various fields (such as art, science, or politics) as inherently worldly nor participate in them simply with and as non-Christians, but must bring into each a distinctively Christian commitment and program. In other words, all of life is inherently religious to reformed Christians. The result would be an organic church, working outside ecclesiastical institutional walls but with a coherent plan and mutual discipline, living out the Word of God in every sphere of life, which would build up the Kingdom of God in the midst of the world.⁸⁷

[63] To these Reformed Christians, this concept of the sovereignty of God has some radical implications. The civil law, or the law of the state, is not the source of all law, nor is it necessarily authoritative. Instead, God's will is authoritative. The radical nature of the notion of sovereignty is that God's will is both knowable and doable. If it were otherwise, God would not be sovereign.⁸⁸ God would instead at most be only some philosophical necessary idea, not particularly useful to practical living, or God's relationship to the world would at most be like that of the watch maker to the watch--the creative source of the world who now simply watches it run its course.

[64] After all, did not Calvin teach the following?

Calvinism, . . . is neither an ecclesiastical, nor a theological, nor a sectarian conception, but an all-embracing system of principles, a

from a uniquely Christian perspective. To understand how Dooyeweerd came to his analysis of Kantian idealism, we must first look at Kuyper's Calvinism. RONALD H. NASH, *DOOYEWEERD AND THE AMSTERDAM PHILOSOPHY* 17 (1962) [hereinafter NASH].

⁸⁷ James D. Bratt, *Dutch Reformed Theology*, in *DUTCH REFORMED THEOLOGY: REFORMED THEOLOGY IN AMERICA* (David F. Wells ed., 1989).

⁸⁸ *Id.*

complete view of life. Such a view of life, in whatever culture we find it, demands an insight into the three fundamental relations of all human life, namely, our relation to God, our relation to man, and relation to the world. Calvinism expresses these relations as follows: For our relation to God, an immediate fellowship with the eternal, independent of priest or church; for our relation to man, the recognition of each person as a value, which is his by virtue of his creation in the image of God, and therefore of the equality of all men before God and his magistrates; and for our relation to the world, the recognition that in the world the curse of sin is restrained by grace, that the life of the world is to be honored in its independence and that we must, in every domain discover the treasures and develop the potencies hidden by God in nature and in human life.⁸⁹

[65] What follows is that no man can claim to be constitutionally devoid of a sense of the divine that God implanted in every person.⁹⁰ God “puts his stamp on our entire life at that point of consciousness in which our life is undivided and lies comprehended in its unity-- not in the spreading vines but in the root from which the vines spread.”⁹¹ It is God who makes man religious. “[T]he sense of the divine, which he causes to strike the chords on the harp of the soul [T]he heart is to be understood not as an organ of feeling but as that point from which God acts and from which he acts on the understanding.”⁹²

[66] Christian belief requires a belief that everything created was furnished by God with an unchangeable law for its existence.⁹³ Christianity calls on its adherents to discover these laws or creative ordinances imbedded in nature. It gives rise to attempts to articulate principles of

⁸⁹ CONRADIE, *supra* note 50, at 12-13.

⁹⁰ *Id.* at 13.

⁹¹ *Id.*

⁹² *Id.* at 14.

⁹³ *Id.*

sphere sovereignty, or the sociological principle that distinct kinds of societal institutions, state, family, school, church, or cultural sectors, like commerce, scholarship, and art, each have their proper jurisdiction, limited and defined by the specific nature of the sphere concerned. And so Christian political parties are defensible as are arguments that Christians need to see various institutions as having particular God given spheres of sovereignty, a sphere of church, of family, and even a sphere of educational sovereignty.⁹⁴

[67] Christian philosophy can give this account:⁹⁵ first, religion is not confined to one group or church, but is common to all men. No man can claim to be constitutionally devoid of the *semen religionis*, which God, together with the *sensus divinitatis*, has implanted in every man. Moreover, religion is a relation of the whole of man to God. (Though shalt love God not only with all thy heart and with thy strength, but also with all thy mind.) The religious organ is

⁹⁴ *Id.* at 12. Abraham Kuyper is the source of these ideas. A summary of Kuyper's thinking is found in his Stone Lectures at Princeton, given at the turn of the century. See Abraham Kuyper, *The Stone Lectures, Princeton* (quoted in CONRADIE, *supra* note 50).

⁹⁵ Dooyeweerd was critical of Kuyper, to the extent that Kuyper was merely interpreting Calvin. Calvin did not articulate a consistent and coherent philosophy, much less a coherent philosophy of law. Calvin did not write about knowing the essence of God, but instead wrote about how the Christian should live after having realized that God's salvation had claimed his heart, and he declared God sovereign in all of life.

Some critics of Dooyeweerd and Kuyper also point out that there is so much to Calvin that is inconsistent and contradictory, that to choose the sovereignty of God as the main principle of Calvin and Calvinism (as opposed to the pervasiveness of sin, Christ's salvation, or predestination) and then to use it to build an elaborate philosophy out if it is to misrepresent the complexity of Calvin's thought. Dooyeweerd recognized this, and tried to argue that he was not describing Calvin's thought as much as attempting to construct an overall Christian understanding of philosophy, theology, science, and all of life in all its spheres. *Id.* at 9.

to be found, not in a part of our being, for example our intellect, will, or feelings, but in our whole being, at that point where all the faculties are drawn together in a unity.

As the entire creation reaches its culminating point in man, so also religion finds its clear expression only in man who is made in the image of God, and this not because man seeks it, but because God Himself implanted in man's nature the real essential religious expression . . . God Himself makes man religious by means of the *sensus divinitatis*, i.e. the sense of the Divine, which He causes to strike the chords of the harp of the soul . . . the heart is to be understood not as an organ of feeling but as that point from which God acts and from which he acts on the understanding.⁹⁶

[68] According to Dooyeweerd, a prominent Christian philosopher, these passages show us the key, how Bible based Christianity destroyed the anthropological concept of man with one tremendous sweep.⁹⁷ It leads Christians beyond the temporal functions, including thought, to the central religious root, the heart, as concentration point and deeper unity of our whole existence.⁹⁸

⁹⁶ Abraham Kuyper, *The Stone Lectures, Princeton* (quoted in CONRADIE, *supra* note 50, at 9).

⁹⁷ Lutheran thought has some parallels to Calvin, in its idea of the role of conscience. See Berman & Witte, *supra* note 9, at 1578.

The reliance upon conscience is aided by the correspondence between the dictates of conscience and the revealed truth of the Ten Commandments. Lutheran theologians teach that God has implanted in the conscience of every person moral insights that correspond to the Biblical injunctions to worship God, to respect authority, not to steal, not to kill, to be honest, to deal fairly with others, to respect the rights of others, and the like. Lutheran jurists called this the moral law or natural law. It differed, however, from the natural law of the Roman Catholic Church, which was founded on reason and on the synthesis of reason and revelation rather than on the conscience of the individual. *Id.*

⁹⁸ See CONRADIE, *supra* note 50. Conradie writes,

From this it follows that there is no aspect of our existence, which can be considered to be indifferent or neutral to religion. God is sovereign all life belongs to Him and is

[69] Up to this point, Christian philosophy would appear to be in favor of the care perspective. It is optimistic that individuals can have a sense of the divine and can know God's will. It would also seem optimistic that lawyers in a dialog with their clients could discover this common sense of call.

[70] Yet again, Christian optimism has to be tempered by the Christian view of sin. Scripture teaches about man's fall.⁹⁹ "In our abnormal condition our immediate communion with God is lost, sin has brought separation and darkness."¹⁰⁰ In particular, sin pervades the intellectual life, and all life, "which includes the life of thought, is affected by original sin, and . . . must be regenerated by God's special grace."¹⁰¹ While one branch of this Christian philosophy, at the turn of the twentieth century, unashamedly tried to establish a uniquely Christian

created by Him according to its proper law and nature. The sovereignty of God over the whole cosmos is then, for Kuyper, the fundamental principle of Calvinism. First stands the confession of the absolute sovereignty of the Triune God, for of Him, through Him and unto Him are all things This is the fundamental conception of religion as maintained by Calvinism, and hitherto, no one has ever found a higher conception.

Everything created was furnished by God with an unchangeable law for its existence. Because God has ordained such laws and ordinances for all life, all life must be consecrated to His service. If everything that is, exists for the sake of God, then it follows that the whole creation must give glory to God.

Id. at 17.

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

government, it nonetheless believed that sin pervaded all of life, all institutions, including the church. Thus, notions of pluralism and respect for different faiths were vital to an understanding of Christian government. Still what the pervasiveness of sin would mean for the life of thought--to knowing through a regenerated heart--was left for others to work out in a more systematic way.

C. Critiquing the Philosopher's Motive: Lessons from World War II¹⁰²

[71] Of course what followed optimistic Christian political writing at the turn of the century was not only World War I, but also the rise of Nazism, World War II, and the Holocaust. In between the time that early twentieth century Christian philosophers first wrote about a Christian philosophy of law and its later interpretation in the 1950s within the United States, was the horror inflicted by the German government on the Jews, which was viewed by many Christians as being tolerated, if not supported, by Christians. Many blamed the philosophy of German Christians, such as Kant and Hegel, that led to the philosophy of Fichte and Nietzsche, which in turn encouraged an instrumentalist view of humans, favored by the Nazis.¹⁰³ Even some who had been early optimists became critical, and cast a wary eye back at these philosophers to determine where they went wrong.¹⁰⁴ This was the context of later twentieth

¹⁰² Herman Dooyeweerd has been described as one the leading creative minds in contemporary theology. See NASH, *supra* note 86, (describing Dooyeweerd's work as a "major milestone" in the development of Christian philosophy).

¹⁰³ *Id.*

¹⁰⁴ Granted, Dooyeweerd's Philosophy of Law-Idea first appeared in 1935. Yet his thinking was not translated into English until it was published under a new title, *A New Critique of Theoretical Thought* (1953), and by that time the historical

century attempts to defend uniquely Christian forms of government.¹⁰⁵ It drove new attempts to articulate the rule of law that would be faithful to Christ, but would not lead to the secular humanism that many saw as the intellectual predecessor of the Nazis.¹⁰⁶

[72] It is also important to understand this context in order to understand how Christian philosophy needs to **humbly** undertake the job of finding the word of God for life.¹⁰⁷ Any Christian philosopher's attempts at describing what was the word of God, that it was knowable and that the regenerated heart could also know it, had to also be very aware of how sin corrupted the heart, corrupted history, and caused error when engaging in any attempt to interpret history and law for human purposes.¹⁰⁸

[73] In some ways then, modern Calvinists struggled with how to understand the authority of law, or the knowledge of God's word, in much the same way that John Calvin tried to understand authority after the fall of the Catholic Church as a legitimating force of the rule of

influences on his work were apparent. Modern translations of Dooyeweerd's work in the fifties show these influences. See HERMAN DOOYEWEERD, *ESSAYS IN LEGAL, SOCIAL, AND POLITICAL PHILOSOPHY* 122 (1996) [hereinafter *ESSAYS*]. And in the mean time, Dooyeweerd put his thinking in the perspective of the aftermath of WWII, with special emphasis on critiquing the German enlightenment thinkers. See HERMAN DOOYEWEERD, *A NEW CRITIQUE OF THEORETICAL THOUGHT (1953-1958)*; HERMAN DOOYEWEERD, *IN THE TWILIGHT OF WESTERN THOUGHT* 1960; *ESSAYS, supra*, at 147-53.

¹⁰⁵ HERMAN DOOYEWEERD, *CHRISTIAN PHILOSOPHY AND THE MEANING OF HISTORY* 107-08 (1995).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

law.¹⁰⁹ After all, if law was the result of natural reason, look what man created in the way of the government of Nazis Germany. It led modern theologians to affirm, once again, that sin pervaded all of life including reason. Ideas derived from a religion where man is god, led to a positive-law-reason driven system that provided support for such sinful ideas as the super race, an ideology derived apparently from a rational desire to promote German definitions of community.¹¹⁰

[74] Belief in the pervasiveness of sin, leads to a profound skepticism about the role of civil law in society. If the civil law is overly rational or legalistic, it may be a product of sin, and an intrusion into the way God meant for life to be structured and lived by His created beings. Christian legal philosophy rediscovers the sinful nature of man, including the sinful nature of man's reason. It replaces the locus of man's image of Godness in man's heart, not his head.

[75] Philosophy which starts with a Biblical understanding of the concept of the heart as the archemidian point for all knowing is sharpened in its quarrel with Kant. The question for philosophy that starts with the Bible is how man is to know God's Word, and to describe the Word of God in a way that will bridge the mind/matter distinctions of humanistic philosophy.¹¹¹ Kant of course also tried to apply analytical philosophy to understanding the ground of

¹⁰⁹ BOUWSMA, *supra* note 44, at 86-94. Remember that corruption of the Catholic Church seemed to prove that though the Church was Christ's body, ruled by the Pope, that the Church was fallible and evil. And, indeed, not only was the church sinful, but man's reason, and natural law, were also sinful. Calvin found that God's order was established through "God's moderation," and neither relied too much on reason nor on passion. It is why Calvin favored the religion of the Greeks to pagan religions. *Id.* at 103.

¹¹⁰ ESSAYS, *supra* note 104, at 153.

¹¹¹ CONRADIE, *supra* note 50, at 52.

knowing.¹¹² And he formulated a system that seated knowing in man's understanding.¹¹³ Kant, however, like Catholic philosophers and theologians before him, failed to see that he had already made an error that would inevitably lead to a religious understanding of God and man, but one that would be inconsistent with the religious tenants of the Christian faith. In Kant's system, man's analytical reasoning replaces God and such a system is idolatry to Reformed Christianity.¹¹⁴

¹¹² FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY VOL. 6, 7 (1964).

¹¹³ *Id.* at 20.

¹¹⁴ Again Conradie describes Dooyeweerd's thinking,

It is well-known that Reformational Philosophy uses the term religion to indicate the *central*, *integral* and *radical* relation between man and his God. It is *central*, for religion does not belong to the periphery of human life, but to its center. It is *integral*, for it is not lost in the multiplicity of human life, but concerns its unity. It is *radical*, for it penetrates to the root of human existence. Religion leads and directs and sets aglow the differentiated structures and acts in human life.

CONRADIE, *supra* note 50, at 35.

Van Dijk, a second commentator of Dooyeweerd, differentiates religion and faith as follows

Unlike religion, faith is understood as an aspect, a modality of human existence and of the whole remaining reality. Faith in this sense, i.e. as a modality, should not be identified with faith as an act of actually believing man. In acts of faith, e.g. prayer, man stands before his God in his unity and totality. These acts of faith, however, have something specific that characterizes them and distinguishes them from other acts where man also appears in his unity and totality.

This specific quality gives an act of faith a peculiar nature so that it can be recognized as an act of faith, and this specific

[76] If pre-Kantian philosophy was religiously motivated,¹¹⁵ post-Kantian idealism also

quality is guaranteed by the modality of faith. Every act of man has a pistic aspect, but with many acts, e.g. thinking, esthetic enjoyment, speaking, etc., this aspect does not play the qualifying part as it does with the specific acts of faith. Indeed, all human acts are ultimately and fundamentally determined by the relation of man to his God, i.e. they have a religious ground, but this does not mean, that all acts are qualified by the modality of faith. The relation of the aspect faith to religion is expressed by Dooyeweerd as follows: Theoretically faith can only be approximated as an original transcendental certainty within the limits of time related to revelation of the Arche which has captured the heart of human existence.

W.K. VAN DIJK, NEUROSIS AND RELIGION, IN PHILOSOPHY AND CHRISTIANITY, 368 (1965) (internal quotations omitted).

¹¹⁵ Dooyeweerd traced the earlier mistakes in modern philosophy to the ancient philosophers; following a mistake in *religious motive* in early Greek philosophy, then mistakes by Aristotle, Thomas Aquinas, and Kant, and mistakes made by modern philosophers of his day. Dooyeweerd looked at Greek philosophy to understand the *religious motive* that was at work; examining the Greeks writings taught Dooyeweerd that it was motivated either by “matter or form,” (what Nietzsche would later term the Dionysic as opposed to the Appolonic elements in Greek philosophy). The first religious motive is to make a god out of death and fate, or to deify matter. The second is to make a god out of culture, measure, and harmony, where the gods themselves acquire individual immortality, and thereby deify “form.” Conradie says that Dooyeweerd’s argued, however, that these motives remain opposed to each other in the Greek consciousness. The immortal Olympic gods themselves could not stay the working of *anangke* (fate) and could not therefore solve the problems of life and death. They furthermore did not establish a moral sanction, and ultimately became the official gods of the polis, while the religious life of Greece itself was bound to the mystery cults of the older religion, for example, the Dionysic and Orphic movements.

According to Conradie, Dooyeweerd found this same battle of “religious motives” in Plato’s dualistic concept of an immortal soul imprisoned in an impure, mortal body. The transcendental world of ideas and the material world battle for supremacy. Aristotle picked up this same dualism, though he tried to synthesize the two in his doctrine of the substantial unity of body and soul, which he also described as the “rational soul.” Yet, to Dooyeweerd, dualism reappears when

Plato and then Aristotle described the act of thought, which Aristotle said is completely separate and comes from without. CONRADIE, *supra* note 50, at 55-57.

Dooyeweerd next examined the religious motive in Thomas Aquinas' work. *Id.* at 56-57. According to Conradie, Dooyeweerd saw Aquinas' *nature and grace* dichotomy as an attempt to reconcile the two opposed religious motives of Greek and Christian thought. "Nature, conceived as matter and form in the Greek sense, becomes the autonomous basis of supernatural grace." *Id.* Yet to Dooyeweerd, this attempt is fundamentally opposed by the Christian doctrine of creation.

In Thomas Aquinas' natural theology, for example creation is understood as a natural truth which can be proved by the argument from motion. But the conclusion of the syllogism assumes as a religious presupposition that God is pure Form. If Aquinas accepts this from Aristotle, he must also accept a prime matter opposed to pure form, which cannot be accepted according to the Christian view.

Id. at 56.

Conradie stated that according to Dooyeweerd, Aquinas comes close. Seeing that there is something fundamentally different about philosophy and theology, Aquinas distinguishes between the order of faith and the order of natural reason.

Faith implies the assent of the intellect, under the compulsion of the will, to something that is not evident in the light of reason but that is revealed by God, where the authority of the God who reveals is itself the motive of assent. Theology, then, is the knowledge of those things that are received by faith from divine Revelation. Scientific knowledge, on the other hand, implies assent of the intellect to something that we perceive as true in the natural light of reason, the assent being here motivated or determined by its object, namely quiddities or essences. Thus we have here two distinct species of knowledge, which causes Aquinas to conclude that the same thing cannot be known and believed at the same time: *impossibile est quod de eodem sit fides et scientia* (science taken here in the sense of rational knowledge).

Id. at 56-57.

According to Dooyeweerd (following Kuyper's view of the lordship of Christ

has a religious motive: it seeks liberty and autonomy no longer in the individual (to Christian philosophy, Nietzsche's morality is unsatisfying and unworkable) but in the supra-personal national community. History and science combine to form the new religion. Accordingly, the new science is both irrational and idealized. The classical ideal of science makes way for the

over all of life) Aquinas' attempt failed exactly because of his over-emphasis on the difference between nature and grace. Again, Conradie,

Where there is no inner point of contact between faith and reason, the so-called synthesis is avenged by the emergence of internal contradictions. Thus, while Aquinas expressly states that if a philosophical conclusion contradicts a revealed truth, the philosopher must re-examine his reasoning in the corrective light of Revelation, his conception of philosophy as *ancilla theologiae* destroys the true nature of theology. Since this theology had accepted Aristotelian philosophy as its "hand-maid," Holy Scripture itself was interpreted in an Aristotelian manner. Furthermore where theology as *regina Scientiarum* claimed to control the *scientiae profane*, what in fact happened was that the special sciences were retarded in their development by Aristotelian theories. In modern rationalism the "handmaid" had indeed broken her bonds and become the mistress. After Aquinas the absolute distinction between nature and grace is openly proclaimed.

Id. at 58.

Next for Dooyeweerd is the emergence of the Humanistic, yet nonetheless religious, motive of *nature and liberty* in philosophy. This new religious motive of liberty, or the *autonomy* of the human personality, inevitably leads to a deification of the individual in an attempt to dominate nature. A new metaphysics is born, inspired by mathematics, which is fundamentally against Aristotelian metaphysics.

Natural science in its classical form, however, construes nature as a mechanism, an uninterrupted chain of causes and effects in which there is no place for a sovereign and autonomous personality. Dooyeweerd saw the conflict between these two ideals in Kant's dualism of nature and liberty, science and belief, theoretical and practical reason. *Id.* at 58.

historical method of thought that relativises the idea of liberty and autonomy by conceiving it as historically determined. It follows that historicism combined with positivistic and evolutionary thought heralds the breakdown of Humanistic culture, and is the final term in the dialectical process of the basic religious motive of nature and liberty.¹¹⁶

[77] There are, then, two fundamental religious motives, the Christian and the apostate, as there are two fundamental types of philosophy, Christian philosophy and immanentist philosophy.¹¹⁷

[78] Philosophy, life, all things immanenating not from man's mind but from God and God's Word are the keys to a world-and-life view that is consistent with the sovereignty of God. It is also key to a Biblical understanding of the heart. Instead of objects being known to reside in the human mind, God's presence and all of creation is known through a regenerated heart. The mind does not create or form the object; the object is reformed in and through God.¹¹⁸

[79] And so Christian understanding of God revealed in the Bible tries this answer: Law is the boundary dividing the cosmos and God. God is apart for the law; but everything else is subject to it. The ideal of God's Will, or the law, cannot be separated from God, its source. Law should not be conceived in a juridical or moral sense. It is not confined to the Ten Commandments. It must be viewed as primarily universal ordinances and uniformities that are present in creation and in all its aspects as constant structural principles making things and events possible. Their character is guaranteed by the fact that God creates them. From the

¹¹⁶ *Id.* at 59.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 61.

Christian *apriori*, the idea of philosophy that makes true belief possible has the following created content: the origin of meaning is the sovereign holy will of God the Creator, who has revealed Himself in Christ; the totality of meaning and unity is the law of love and service to God and our fellow-creatures with our whole heart. With respect to human responsibility, meaning comes from this new religious root of the human race in Christ. Finally, the relationship between sovereign God and the revelation of His love in Christ and the world is the mutual irreducibility of God and God's love revealed in Christ and in all creation.¹¹⁹

¹¹⁹ Conradie describes, in the language of his philosophy, Dooyeweerd's position:

Law is the boundary dividing cosmos and God. God is above the law; everything else is subject to the law. The ideal of law can thus never be separated from the idea of the source of law and the idea of the subject of law. Law and subject are correlative terms. Dooyeweerd does not conceive of the notion of law in a juridical or moral sense. God's laws are not confined to the Decalogue. They must be seen primarily as universal ordinances and uniformities encompassing creation in all its aspects as constant structural principles making possible individual things and events. Their ontological character is guaranteed by the fact that they are not founded in the subjective consciousness, but are created by God.

Id. at 68-69.

Conradie explains Dooyeweerd as saying:

From the Christian religious *apriori*, the cosmomic idea of philosophy receives the following contents: To the question, what is the origin of the totality and modal diversity of meaning with respect to the cosmomic side and its correlate, the subject-side, Dooyeweerd answers that it is the sovereign holy will of God the Creator, who has revealed Himself in Christ.

D. Christian Belief and Understanding of Time

[80] Are we done? Not quite. From the foregoing Biblical exegesis it appears that humans have been created in the image of God. What follows is that the heart can know God and God's Word. It also follows that knowledge is not simply attained through reason, but is known or revealed because it is already written on the heart of every person. At this point it appears to be a philosophy that is consistent with care's description of how, during a caring dialogue, knowing what to do will emerge. After all, the Word is written on the human heart.

To the second transcendental question, what is the totality of meaning of the cosmic aspects, and their supra-temporal unity Dooyeweerd answers that with respect to the cosmonomic side it is the law of the love and service of God and our fellow-creatures with our whole heart. With respect to its subject-side, it is the new religious root of the human race in Christ.

To the third transcendental question regarding the relation between the modal aspects, Dooyeweerd answers that it is sphere-sovereignty, the mutual irreducibility of the modalities within the cosmic coherence of meaning, subject to cosmic time.

The totality of meaning of our whole temporal cosmos is to be found in Christ, with respect to His human nature, as the root of the reborn human race. In Him the heart, out of which are the issues of life, confesses the Sovereignty of God, the Creator, over everything created. In Christ the heart bows under the *lex* (in its central religious unity and its temporal diversity which originates in the Creator's holy will) as the universal boundary (which cannot be transgressed) between the Being of God and the meaning of His creation. The transcendental totality of meaning of our cosmos exists only in the religious relation of dependence upon the absolute Being of God.

CONRADIE, *supra* note 50, at 69.

[81] Yet scripture teaches a very important role for a sociological understanding of history, one that teaches that humans live in an in-between-time, in-between the time of Christ's saving death and His coming again to reign in power. It is in this added idea of the in-between-time that Christian optimism is tempered and it rediscovers a deep need for humility. The word of God is never known directly. It is only known through a lens of time, which reflects God's will, and also has the effect of changing humankind's recognition of God's will, as humankind lives out its history.

[82] It is helpful to be able to picture what a biblical faith and belief means when applied to social theory and philosophy. Compare for a moment American assumptions about the nature of authority and law with the sphere sovereignty model.¹²⁰ A U.S. educated citizen would start with the notion of the people and the electoral process as the foundation of law. "We the People, in Order to form a more perfect Union, establish" government.¹²¹ The people reserve to themselves certain rights, but the government is set up as an institution that is free to serve the people as long as it does not infringe on the rights that the people have reserved.

[83] The biblical model starts with God and says that God's word comes from God through the time modality and is reflected into a group of spheres that stand side-by-side in and under the Word. Two things become immediately apparent. Not only is the church out of the top position under God, but so also is the state out from the top position, standing side-by-side with business, labor, family, science, etc. It is why some herald protestant theory as producing a view of a limited role for government (even democratically controlled and originated), one that

¹²⁰ See Berman & Witte, *supra* note 9.

¹²¹ U.S. CONST. pmb. l.

the Bible describes in the Old Testament as a necessary evil because of the hardness of the children of Israel's hearts. Christian social theory combats evil not by dividing government into three branches to divide and check its power, but by limiting the sphere in which the government operates to matters of internal and external security, and in providing a basic safety net for outcasts in society.¹²²

¹²² Dooyeweerd described how God's law would show up in the in-between time of history. As John Witte says, Dooyeweerd offered a historical and philosophical analysis necessary to fulfill the fourfold task of (1) identifying the independent structures or institutions which comprise society; (2) describing the nature, inner norms and constituent parts, which render each of these social institutions distinctive; (3) defining the purpose, function, or reason for each of these structures; and (4) analyzing the proper relationship among them. (These four tasks demand far more than a mere empirical description of the different aggregates and groups, which happen to exist in a given society.) Such empirical work is the task of social *science*, of positive sociology. The task of social theory is to inquire into the abiding order and laws that constitute all social institutions, prescribe their functions, and dictate their interaction. It demands the social theorist to penetrate beyond the positive forms given society to underlying social norms and principles. John Witte, Jr., *Introduction*, in HERMAN DOOYEWEERD, A CHRISTIAN THEORY OF SOCIAL INSTITUTIONS 19 (Magnus Verbrugge ed., 1986). Dooyeweerd complied with what amounts to an extremely complex legal philosophy that not only saw spheres in society, but also identified fifteen different spheres in being and knowing. To explain and critique his complete philosophy and how he arrives at and describes these fifteen spheres is beyond the scope of this paper. What is important is that Dooyeweerd crafted a view of sociology and, in turn, of the law that was consistent with neo-Calvinist principles. One might look at modern day government in the Netherlands as still a product of this model of authority. It seems to have produced in some ways a very liberal society, (abortion, physician assisted suicide, legalized prostitution) yet one that works for its people despite the fact that the role of government has been reduced. I believe this model might work particularly well for a small country with a homogeneous society, where shared values about home, school, and business may successfully discipline each other sphere and contain government within its "proper" place. One wonders whether it is necessary to keep government within its sphere, to curb its grab for power, or at least allow some cooperation between different governments when business grows and becomes international.

[84] Whether one agrees that what God created is a set of spheres that have within them the Word of God, what Calvin and Christianity teaches is that individual Christians must interact with the world and seek to transform. The presence of sin does not excuse the Christian from taking a role in reforming society. According to Calvin, the Bible teaches that there is a present permeation of all of life by the gospel. Human beings are called, they have vocations, and their activities are expressions of their faith and love as they seek to glorify God. And the splendor of human nature is evident despite the fall. Moreover, the actuality of God's sovereignty presently leads to the thought that what the gospel promises and makes possible, as divine (not human) possibility, is the transformation of mankind in all its nature and culture into a kingdom of God, in which the laws of the kingdom have been written upon the inward parts.¹²³

[85] To review, the Christian understands that everything follows from the Sovereignty of God:

1. God's Word stands over the law
2. God's sovereignty means that he transcends the society and His law both is and ought.
3. God's Word is seen through the lens of time.
4. The lens of time breaks the Word into spheres, where the Word is sovereign within each sphere, or at least, explains the compatibility of God's Sovereignty and the pervasiveness of sin.
5. God's Word is knowable.
6. God's Word is knowable through Scripture, Holy Spirit, and general revelation to a regenerative heart. (Not a Magical system)

¹²³ H. RICHARD HIEBUHR, CHRIST AND CULTURE 217-18 (1951).

7. Faith allows us to make the leap to knowing the arche, knowing God's Word before it is refracted to the lens of time.
8. The Heart has cosmic significance. It is through man's fall, that the whole earth falls. It is through Christ, known by the regenerative heart, in the Spirit, that the whole world becomes made right.

E. Remaining Questions of Application.

[86] As much as the foregoing may resonate with protestant faith, there are a number of troubling problems that this reformed view of the world causes for the practice of law and practical legal counseling. First, if finding the will of God requires looking through the lens of time, it therefore involves historical work, study, and time itself. This is the same critique Christians level at Hegel and other history based models. And how does one ever really know whether the way things were is the way things will be or ought to be in the future? How is the lawyer to determine whether there is a difference between God's word for a client and the law of the state? Does it depend on the hearts of the people who wrote the laws (the regenerative heart of the prosecutor perhaps) or on the hearts of the people who voted for the representatives who elected the laws? Is there a notion of a collective regenerative heart? Does it depend on whether the U.S. is a Christian nation, grounded by a Constitution written by persons of faith (some would say by reformed Christians) and that the law derived from a government wrought out from the Constitution should presumptively reflect the Word of God for how people ought to live and what punishment they out to bear if they break that law? Are we back around at the Puritan's covenant jurisprudence?

[87] The sinfulness of the heart, of the state, of even the collective will of the church, causes the Calvinist to be in a constant state of analysis, questioning and searching for what is or ought to be the will of God in any given setting at any given time. Even assuming that the Christian has correctly engaged in his Christian sociological analysis, and can determine the spheres, the question often remains, what then? What then should the individual do in relationship to these sinful institutions? For the Christian understanding of the sovereignty of God denies that any decision will be amoral or relativistic. The regenerative heart can know the Word of God for a particular situation,¹²⁴ and to think otherwise would be to deny the sovereignty of God over all of life.¹²⁵ Yet how does one find what is the Word of God without resorting to mysticism or without resorting to the worship of reason, which, we have decided, too often leads to error?

[88] Second, even where the lawyer may believe what she would do in similar circumstances, how does the lawyer know what the client should do? As William James argued at the turn of the century, however brilliant the philosophy or science, there comes a time to apply it in the real world. Individuals need to interpret their feeling and knowing into doing. “[I]ndividuality is founded in feeling; and the recesses of feeling, the larger, blinder strata of the character are the only places in the world in which we catch real fact in the making, and directly perceive how events happen, and how work is actually done.”¹²⁶ Historical facts meet individual

¹²⁴ Dooyeweerd’s thinking resonates in Jonathan Edward’s work, *A Treatise Concerning Religious Affections*. See EDWARDS, *supra* note 17, at xxxi-xxxv.

¹²⁵ Again, Jonathan Edwards took a similar position. *Id.* at xxxv.

¹²⁶ William James, *Varieties of Religious Experience*, in SOURCES OF THE AMERICAN MIND 119 (Loren Baritz ed., 1902).

facts, and knowing God's will for an individual will necessitate drawing on the history of that individual. These are questions of epistemology, which are very individualistic.

[89] And unfortunately for our discussion, Biblical Christianity is in a bit of dilemma. If it tries to define or give substance to how the individual knows God's will, the danger is that it will give substance to the heart, and then repeat Kant's error of making man god. Ronald Nash has made this same point:

But now that we are finally ready for his answer, Dooyeweerd tells us that there is no answer--or at least that we are incapable of knowing it. Dooyeweerd has been outspoken in his repudiation of Kant's *ding an sich*. But Dooyeweerd's unknown and unknowable basis of individuality begins to look very much like a "thing-in-itself." John Locke believed that there must be some underlying substance that held the properties of things together. Locke called this substance a "something I know not what." Dooyeweerd also believes that "something" ties the functions of a thing together. But then he stops and claims that this unified structure of things cannot be explained. It is simply grasped by naive experience, that is, this unity is a *given*. One must wonder if there is not another reason why Dooyeweerd stops his investigation where he does. Can it be that he realized that if he went any further, he himself would be involved in the very notion of an underlying substance or *ding an sich* which he earlier rejected as belonging to "apostate philosophy?"¹²⁷

[90] Does it make any sense for a lawyer of faith to try to argue for or convince a client to look for and do the will of God for their lives when it is impossible for the lawyer to describe how he knows the will of God without violating the sovereignty of God? If reason and analysis are insufficient to persuade a client about what is the right thing to do, and if a regenerative heart is a condition precedent to knowing God's Word, then should the lawyer be involved at all in giving advice to client about what they should do with their lives? In the context of our starting

¹²⁷ NASH, *supra* note 86, at 67.

point, that of legal counseling, if the heart is either oriented toward God or not, should the lawyer of faith try to convince the client what is the right, wise, or loving thing for the client to do, or will the lawyer rely too much on reason, and in doing so, unknowingly pervert God's will for that individual?

[91] Still Christian philosophy gets us to virtually the same place that the care perspective reaches. Dooyeweerd would likely agree that the lawyer may know, be convinced in her heart, be drawn to believing a course of action is the right thing or God's will for a situation. Yet how will a lawyer with such belief best describe what those beliefs are? And what reception is such a lawyer likely to get from the client?

[92] To some, the lawyer with such beliefs may be charged with arrogance if she tries to express a belief regarding the right thing to do. After all, her justification is a non-rational impulse based (in Christian faith language) on the working of the Holy Spirit. Yet, to not speak and still believe is another kind of arrogance. To sit smugly, believing that one knows the right thing to do but not communicating such a belief disrespects the client by not believing the client can handle justifications that are non rational.¹²⁸ Still, to urge the lawyer's beliefs on the person, with reference to divine authority, is to draw attention to the non-rational way that the lawyer knows it is the right thing to do. Would it be better to just use the language of reason and logic and leave the matters of the heart to the individual client? To understand the problem with this position--to level the playing field by considering the alternatives--we need to see the weaknesses in any position--including those Christians who claim to know what God wants another to do-- that places too much faith in human reason and sinful human arguments.

¹²⁸ PLANTINGA READER, *supra* note 61, at 187-209.

F. Unconscious Examination by the Human Heart.

[93] In the 1920s, the theological world was hard at work on constructing Christian philosophy. Giants of the theological world, such as Charles Hodge, B.B. Warfield, Francis L. Patton, William Brenton Greene, Jr., and J. Gresham Machen, tried to present evidence and arguments from all different lines of thought in an attempt to show that God exists, that the Bible is the Word of God, and that the burden of inferential proof is so great that there is no excuse for an unbeliever to reject Christianity.¹²⁹ Yet these attempts are too optimistic, especially from the perspective of theology after the Holocaust.¹³⁰ We can now be highly skeptical of these theological attempts, and see that in apologetics, one must not begin with human reason but with presuppositions that are biblical.¹³¹ In this way that the reformed tradition as articulated must maintain that if God is self-sufficient then He alone is self-explanatory. And if He alone is self-explanatory then He must be the final reference point in all human predication.

[94] It may then be impossible to find a common area of knowledge between believers and nonbelievers unless there is agreement between them as to the nature of persons. And since nonbelievers put themselves in the position of God, determining good and evil, they, like the

¹²⁹ Wesley A. Roberts, *Cornelius Van Til*, in *DUTCH REFORMED THEOLOGY* 73 (David F. Wells ed., 1989).

¹³⁰ Cornelius Van Til's work and writing is instructive. *Id.* As a religious philosopher, who holds both to the sovereignty of God and the sinfulness of man, Van Til's writing seems to teach lawyers of faith how to counsel clients (or, for that matter, any professional of faith speaking to those who do not claim God as the sovereign force in their life). A quick word about Van Til's background: Van Til started his work as student and scholar at Princeton Theological Seminary in the late 1920s.

person wearing sunglasses, will see the world in a different light. Moreover, and most importantly for our discussion, a metaphysical point of contact, the heart, can be found in the natural person. As Cornelius Van Til, a prominent Christian theologian stated,

With Calvin I find the point of contact for the presentation of the gospel to non-Christians in the fact that they are made in the *image of God* and as such have the ineradicable sense of deity within them. Their own consciousness is inherently and exclusively revelational of God to themselves. No one can help knowing God for in knowing himself he knows God. His self-consciousness is totally devoid of content, unless as Calvin puts it at the beginning of his Institutes, man knows himself as a creature before God. There are no atheistic men because no man can deny the revelational activity of the true God within him Every human being is by virtue of his being made in the image of God accessible to God. And as such he is accessible to one who without compromise presses upon him the claims of God.¹³²

¹³¹ *Id.* at 74.

¹³² *Id.* at 81 (emphasis added); *see also* ANTHONY A. HOEKEMA, *CREATED IN GOD'S IMAGE* 71 (1986) (Hoekema, a psychologist and professor of systematic theology, in the Calvinist tradition writes in explicitly Christian language, quoting scripture along the way).

What, now, do we mean by the image of God in the narrower, material or functional sense? Traditionally, Reformed theologians have described the image of God in this sense as consisting in true knowledge, righteousness, and holiness. They derived this description in part from two Scripture passages: Colossians 3:10 (“and have put on the new self, which is being renewed in knowledge in the image of its Creator”) and Ephesians 4:24 (“and to put on the new self, created to be like God in true righteousness and holiness”). Various theologians have described this aspect of the image in several ways: as man’s giving the right answer to God (Brunner); as man’s living in love toward God and toward his neighbor (Otto Weber); and man’s living in the right relationship with God, the neighbor, and creation (Hedrikus Berkhof); or as “concretely visible sanctification” (G.C. Berkouwer). Thus the image of God in the narrower sense *man’s proper functioning* in harmony with God’s will for him.

[95] We must be clear that as long as the natural man is self-consciously working from his ultimate position of self, he can have no notion in common with the believer because the unbeliever's epistemology is informed by his ethical hostility to God. On the other hand, scripture tells us that in the course of history the natural man is not fully self-conscious of his own position. Like the prodigal son in the story of the Good Samaritan, he cannot altogether stifle God's voice. There is a conflict of notions within him of which he is not fully conscious. The principle of autonomy seeks to suppress his knowledge of God, and the restraining power of God's common grace seeks to suppress the principle of autonomy. The internal semiconscious conflict makes it impossible for him to proceed consistently for the one principle or the other.¹³³

[96] And so a Christian can only make the case to nonbelievers **indirectly** as opposed to directly. Since there is no knowledge without God, there can be no agreement on either law or facts. That means that the Christian apologist is required to place himself in his opponent's position, assuming its correctness for arguments sake, in order to show him that on such a position the facts and laws have no meaning. Conversely, the non-Christian will be asked to place himself upon the Christian position for argument's sake, in order to be shown that only upon the Christian basis are facts and laws intelligible.

Id. at 73 (emphasis added).

Hoekema also seems to have arrived at what Plantinga described as the "properly functioning" human, the human functioning as designed and created by God. Hoekema finds that this idea first resides in scripture, and is therefore consistent with Calvinistic principles. So while the "ethics of care" is not derived from scripture, it certainly could be.

¹³³ DUTCH REFORMED THEOLOGY 78-85 (David F. Wells ed., 1989).

[97] What the Christian lawyer is hoping, and indeed praying for (though silently), is that his clients discover their dependence on others if not the great Other. While limited to the discovery of their dependence on those whom they are in relationships with, the falsity of reliance on their own wealth and power is made plain. And this is a key--that they know they are not islands unto themselves, that they sin and fall short of the glory of God, and are dependent on God as the source of all that is good.¹³⁴

[98] Does the client's understanding need to occur in expressed God speak?¹³⁵ In fact

¹³⁴ Friedrich Schleiermacher is said to be the author responsible for realizing the innate religious nature of all persons. See KEITH W. CLEMENTS, *FRIEDRICH SCHLEIERMACHER: PIONEER OF MODERN THEOLOGY* 35-66 (1987); KARL BARTH, *THE THEOLOGY OF SCHLEIERMACHER* 150-151 (1982).

¹³⁵ The New Testament has a number of strong passages that suggest that the explicit source of knowledge in Christ is a necessary testing ground.

Dearly loved friends, don't always believe everything you hear just because someone says it is a message from God: test it first to see if it really is. For there are many false teachers around, and the way to find out if their message is from the Holy Spirit is to ask: does it really agree that Jesus Christ, God's Son, actually became man with a human body: If so, then the message is from God. If not, the message is not from God but from one who is against Christ, like the "Antichrist" you have heard about who is going to come, and his attitude of enmity against Christ is already abroad in the World.

I John 4: 1-3.

Yet *I John* itself describes the essence of knowing God.

Dear friends, let us practice loving each other, for love comes from God and those who are loving and kind show that they are the children of God, and that they are getting to know Him better. But if a person isn't loving and kind, it shows that he doesn't know God--for God is love. God showed how much He loved us by sending His only son into this wicked

Van Til's Calvinism seems to teach that it is better done without explicit reference to God. In terms of the language of the care perspective, it is better to simply ask the client what the client thinks is fair and what feels right.¹³⁶ What is the caring thing to do? How will your action affect those in a relationship with you? Will you fairly affect your opponent by what you do? Put yourself in the other side's shoes for a moment. Is what you are doing fair, or what you would have

world to bring to us eternal life through His death. In this act we see what real love is: it is not our love for God, but His love for us when He sent his Son to satisfy God's anger against our sins. Dear friends, since God loved us as much as that, we surely ought to love each other too. For though we have never yet seen God, when we love each other God lives in us and his love within us grows ever stronger.

I John 4: 7-12.

¹³⁶ Lawrence Cahoon summarizes Jurgen Habermas's philosophy in a way that resonates with the need for dialog. Cahoon says in his introduction to Habermas's Essay, *An Alternative Way out of the Philosophy of the Subject: Communicative versus Subject-Centered Reason*,

Habermas's reformulation of modernity is based on the two insights that: (a) rationality is inherently linguistic and discursive, hence social; and (b) discourse requires that interlocutors assume the possibility of sincere truth-governed speech. This means that participants in discourse cannot regard all discourse as merely a matter of power and self-interest. Consequently Habermas denies the pessimism of Adorno and Horkheimer, as well as the postmodern denial of the transcendence of norms: their remain, he claims "a moment of unconditionality," of truth and freedom in human relations despite the inroads of the late modern "system" of money and power.

Lawrence Cahoon, *Introduction to An Alternative Way out of the Philosophy of the Subject: Communicative versus Subject-Centered Reason*, in *FROM MODERNISM TO POSTMODERNISM: AN ANTHOLOGY* 589 (Lawrence Cahoon ed., 1996). While I agree with the failing of subject-centered reason, I disagree that human reason is the guiding principle in the communicative alternative.

them do to you? Loving your neighbor as yourself is then taught outside of the context of an explicitly religious discussion. A Christian lawyer teaches a client what it means to love by using the care perspective's Socratic dialogue that asks reflective questions. God's will and His Word may emerge from the discussion, but not from naming it as such.¹³⁷

[99] Van Til is correct in stating that an indirect dialog is key: God's will emerges

¹³⁷ A fifth neo-Calvinist, Anthony Hoekema describes to a Christian audience the role of Christian Counselor. He writes,

The primary goal of the Christian counselor, it seems to me, ought to be to *help his client apply to his or her own life what the Bible teaches about the Christian self-image*. Let the counselor try to remove whatever may be hindering the client from accepting these biblical teachings. Perhaps what the client needs most is to be assured that he is indeed a worthy person in God's sight--who is not only a creature of God but also an object of God's redemptive love. Perhaps the client needs to be reassured that there is a sense in which he may and indeed should love himself in the order that he may properly love his fellow man. Certainly he needs to see the love of God for him reflected through the counselor's own acceptance of him as a person. What, now, are some specific procedures a counselor might use to help his client attain his goal? One such might be *significant dialogue, in which the client is helped to evaluate himself realistically*." Another procedure a counselor might use is to explore the possibilities of group counseling . . ." the "goal is to increase [the clients] understanding of himself and his [important] relationships."

Id. at 105-06 (emphasis added).

Again, I am not sure that the counselor of the non-Christian needs to use these exact words to make the same points, that the client is loved, should not understand himself or herself only in materialistic terms and measures, and should see himself or herself in human relationships of interdependence.

indirectly when the client is unconsciously acting “religiously”¹³⁸ or with a “regenerative heart.”

If a lawyer argues that the God of scripture and history says you should settle this lawsuit on the principle that you ought to love your neighbor, the client’s reaction is likely a religious, “so?” In the same way, a lawyer who argues that economic efficiency is god; who makes a faith statement--(1) you should do x because greater dollars will be produced for you and (2) society as a whole is therefore better off because greed produces more wealth than altruistically driven decision-making--can leave a client unmoved if the client does not share those beliefs. The client wants to answer, “I am god, and who are you to tell me what God says, or what the future will hold, or what economic principles dictate anyway.” The response is consciously religious. Better to ask, what is the caring and fair thing for you to do, and have the client struggle with what caring, fairness, and justice means within the context of those who are in a relationship with him. If the client’s humanness means an unconscious dependence on the other, then a counselor’s questions of caring, compassion, and fairness indirectly ask clients to see themselves in relation to others and to the Other.

[100] But what if the client gets it wrong? To this question the Biblical Christian response must be accompanied by a stern reminder that one should humbly recognize that God is the source for judging what is right and wrong, not reason. While Scripture gives a broad-brush look at God’s relationship with the people described, humans cannot trust their reason to know God’s will. Love in Christ is the point of unity. Technical legalistic understanding of scripture is similarly susceptible to sin. Knowing God’s will is a matter of faith, and the role of counselor

¹³⁸ See Gear, *supra* note 17 (describing a Mirror Image model that indirectly raises questions of fairness).

is to explore, with all humility, the meaning of the client's decision in all its complexity.

VI. A MODEST PROPOSAL

[101] The final proposal then is quite modest. Where the lawyer is herself capable of advanced empathy, examining the likely consequence of the client's decision for the client and those in a relationship with the client when the client proposes to do what the lawyer believes is the wrong thing, the care perspective urges the lawyer to express her belief by asking the client whether his decision is caring and fair to the wronged person. After a careful dialog, designed to generate an understanding of the client's perspective, however, the ultimate decision must still be left with the client. Christian humility demands as much. Therefore, except those situations where the lawyer and/or client judges that the lawyer could not be an effective advocate for the client (and, according to American profession responsibility dictates, must withdraw), in the end, the lawyer can and should rely on the client's decision, as the best that can be done, and leave the rest to formal dispute resolution process. For humans to declare they know God's will for someone else is to make the same reliance-on-reason mistake that humanistic philosophy makes. Otherwise, the lawyer will mistakenly view the infallibility of her own reasoning process and deny the power of sin in her own life. Bible based philosophy warns lawyers of their own sinful tendency to unfairly dominate the client with their fallible moral perspective.¹³⁹ In addition, lawyers should not use language that will draw attention to the consciously religious nature of the discussion, which may tend to decrease the chances that clients will think, selflessly, about what to do, and contribute to their inability to see God's will for their lives.

¹³⁹ *Id.*

VII. THE CARE PERSPECTIVE: PRACTICAL ADVICE FOR LAWYERS COUNSELING CLIENTS

[102] To the question of whether lawyers should engage in counseling that seeks to impart practical wisdom and morality, I have tried to answer yes, but with this caution; that Christianity itself, the source of the strongest beliefs about the sinfulness of man, teaches lawyers humility and the need for caring, empathetic dialogue. It warns against the lawyer self righteously imposing his or her belief system on the client, either in words or in tone. God's will if it will be known, will come to a regenerative heart that is not consciously considering questions of power and autonomy. And attempts to impose or manipulate the client to do the right thing are bound to fail if the discussion turns to the client's conscious religious motivation.

[103] The main objection to the care perspective is a religious objection about the nature of man. Yet this objection ignores the religious context of the objection--that humankind is inherently religious because of the sovereignty of God, which in turn provides an optimistic answer to the question of whether God's will can be known. Then again, the same religious theology warns against any individual proclaiming that he knows what God's will is for another.

[104] For to know God's will, is an uncertain process, filled with illusions of human reasoning processes. Scripture itself teaches the importance of the regenerative heart to the knowledge of God's will, and that even heroes of faith, Abraham, David, Peter, James, and John, are not immune from wrong headed decisions. And from the foregoing, this answer need not be seen as a naive answer, but is one that recognizes the sinful nature of both lawyer and client, and even the laws that constitute society's rules.

[105] In the end, the lawyer is not left a Skeptic; with only an excuse for selfish decision-

making and manipulation. A lawyer who enters into a caring dialogue can produce a time of reflection and empathy where God's will can be made known; it will emerge, having already been written on the human heart. It is appropriate for the lawyer to lead the dialogue because, after all, it is the lawyer who is most rigorously trained in analytical thinking, risk analysis, and the deconstruction of knowledge. If comprehensive problem solving is the essence of what makes the lawyer a professional, then that comprehensive thinking must help the client struggle with the faith based decisions that the client needs to make. In addition, it is also appropriate because of what the lawyer's own experience teaches concerning the way that clients' decisions will later affect their lives and relationships.

[106] In particular, in this day of religious fundamentalism, this paper has asked whether the Christian legal professional can learn from examining how reformed Christians--those who claim the sovereignty of God in all of life (and therefore are ultimately optimists), and who simultaneously adhere to the belief that man is totally depraved (and are therefore also pessimists)--have come to reconcile two apparently paradoxical beliefs. At the same time, this paper has attempted to answer what a religious lawyer--a lawyer who takes his or her religious faith seriously as having importance to life and lawsuits--must learn from the Christian belief in both the sovereignty of God and the sinfulness of man. Can the lawyer learn to give his or her own world-and-life view advice without invoking discussions of religious differences that are likely to be unhelpful and may destroy efforts to resolve legal disputes in accordance with God's will for the individuals involved?¹⁴⁰ Can lawyers learn to discuss matters of religion without

¹⁴⁰ B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-11 (1980); *see* KRONMAN, *supra* note 15, at 143-45 (urging American law schools to teach lawyers the importance of imparting "practical wisdom" to their clients); *see also*

exacerbating differences between themselves and their client--or between clients--differences in how they perceive the nature of man and the meaning of life, beliefs which lie at the heart of resolving these dilemmas? The care perspective can show the way.

[107] How Christians reconcile the role that they should play in giving advice can be instructive of the way any lawyer of any non-rational religious faith might reconcile faith and lawyer advice giving. If all of life is religious, then lawyers will inevitably give religious non-rational belief based advice whenever they go beyond giving technical legal advice. And even where the lawyer only gives technical legal advice,¹⁴¹ the lawyer gives advice that reflects a religious view nonetheless. I have taken the definition of religion from neo-Calvinism and what others have called a neo-Calvinist world and life view.¹⁴² This does not mean that the lawyer should not give religious advice and counsel to the client. My position is that for a neo-Calvinist lawyer, giving religious advice is inherent to the task of imparting practical wisdom.¹⁴³

Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985) (discussing the role of religious conviction in making political and judicial decisions).

¹⁴¹ When I say technical legal advice, I mean advice that deconstructs the standards governing the client's behavior and predicts the decision maker's acceptance of the clients reconstruction of the facts and standard in that client's favor, without regard for the client's responsibility for his or her behavior in causing harm.

¹⁴² See generally RELIGIOUS LIBERTY IN WESTERN THOUGHT (Noel B. Reynolds & W. Cole Durham, Jr., eds., 1996).

¹⁴³ I am dealing with counseling a client who is a defendant in a civil setting. The lessons learned should be applicable to lawyers that give advise in a variety of settings, whether to corporate defendants selling tobacco, Dalkon Shields, or asbestos products. As to the role of lawyers who defend those accused of committing a crime, I generally buy into the greater good theory--of requiring the state to prove the case to protect all future innocents for the power of the state. Of course, plaintiffs have there own set of legal/moral dilemmas, as do prosecutors.

[108] The solution is a processing model: one that marries the fundamental beliefs in the sovereignty of God and sinfulness of humankind with the care perspective. The care perspective best reconciles the lawyer's inevitable religious perspective with the autonomy impulses of the client. This marriage is not without some difficult compromises, but it is the best explanation of how a lawyer who believes in the sovereignty of God and the sinfulness of humankind can best give both legal and wise advice to her or his clients within, as opposed to apart from, the American legal system. It simultaneously helps explain how a lawyer can provide moral advice without dominating the client or evoking the consciously religious nature of the decision.