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RELIGIOUS RULES
THE JUDEO-CHRISTIAN NATURE OF THE ABA MODEL RULES
AND WHAT IT MEANS FOR THE LEGAL PROFESSION
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ABSTRACT

This article argues that the American Bar Association Model Rules of Professional Conduct are not only biased in favor of Judeo-Christian biblical values, but actually are religious rules based in the Bible. The religious nature of the Model Rules affects lawyers in several different ways. There must be awareness of and a conscious choice about the nature and effects that these rules have on law students, bar applicants, and practicing lawyers.

I. INTRODUCTION – CHANGING THE QUESTION

The ABA Model Rules of Professional Conduct are based on and reflect Judeo-Christian ethical principles, specifically those derived from the Bible. This does not mean simply that these Rules are slightly Judeo-Christian centric. That is expected, given that the majority of practicing lawyers in the United States today are Caucasian men. The fact that the ABA Model

1 Second year student at the University of Colorado Law School. I would like to thank Monroe Freedman and Mark C. Taylor for their inspiration and instruction.
2 Given that all states have adopted some form of the ABA Model Rules of Professional Conduct, see infra note 12, and that the ABA Rules form the basis for the MPRE, see infra note 8, my discussion will focus only on the ABA Model Rules. Therefore, when I mention “Rules” or “Model Rules” (capitalized), I am referring to the ABA Model Rules of Professional Conduct and their history. I use the word “rules” (lower case) most often in the context of “religious rules,” to mean a set of norms or standards informed or created by a Religious ideology. It should be noted that there is much more detailed and interesting discussion to be had when you include the Restatement and various state ethics rules. Unfortunately, this is just beyond the scope of what I can discuss here.
Rules are actually based on biblical ethics and, in many cases, are traceable directly to biblical passages, means that these rules effectively are religious edicts. 4

This religious basis has a material effect on the legal profession in three different ways. First, it affects law school education. Every accredited law school in the United States now requires every law student to take and pass an ethics class that includes the ABA Model Rules. 5

This means that every law student must spend about three hours a week, for about 14 weeks, discussing the Model Rules. 6 However, the word “religion” does not appear in any of the major text books used in ethics courses today. 7 If law schools truly intend to educate future lawyers on what ethical behavior means in the legal profession, then there must be an honest discussion in ethics classes about the origins of the Model Rules. Currently, the religious basis of the Rules shapes the discussions in law school classrooms without students or professors being aware (at least explicitly) of its existence. People are talking about religion without knowing it. In a profession where investigation, cross-examination, and source-citation are so necessary, this superficial discussion seems not only inaccurate, but dishonest.


4 It should be noted that the word religion is a slippery slope, and can mean different things in different contexts. For the purpose of this discussion, I will use the word religion to refer to what might commonly be referred to as “organized religion” - the complex system of beliefs that have been formalized and codified to create a group with which an individual can identify (e.g. Christian, Jewish, etc.). I will usually use the word religious to delineate religious texts from what might be called secular legal texts (although I find the concept of secular legal texts problematic in itself). In this context, a religious text should be understood to mean a text which self-identifies as containing stories, edicts, inspiration, and other hallmarks of a complex belief system (e.g. the Torah for Judaism, the Bible for Christians, etc.). See generally, Jonathan Z. Smith, Religion, Religious, Religious, CRITICAL TERMS FOR RELIGIOUS STUDIES 269 (Mark C. Taylor ed., 1998).


6 I certainly cannot speak for every instance but, in my law school ethics class, the word religion was not mentioned once. In fact, the word religion did not even appear in the index of my ethics text book. Lisa G. Lerman & Philip G. Schrag, ETHICAL PROBLEMS IN THE PRACTICE OF LAW (2nd ed., Aspen Publisher, 2008).

Second, the religious basis of the Model Rules affects admission to the bar. In 2009, 47 out of 50 states required aspiring lawyers to pass the Multistate Professional Responsibility Examination (MPRE).\(^8\) According to the National Conference of Bar Examiners, “[t]he purpose of the… (MPRE) is to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct” and “the law governing the conduct of lawyers is based on the disciplinary rules of professional conduct currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct.”\(^9\) Thus, the purpose of the MPRE is largely to test one’s knowledge and application of the ABA Model Rules. If the ABA Model Rules are based on the Bible, what exactly is the MPRE testing? This is something the profession should consider. This might also mean that the MPRE is just as biased toward Judeo-Christian, Caucasian males as the undergraduate SAT Reasoning Test was accused of being several years ago.\(^10\) There is no data yet to confirm or deny this hypothesis, but perhaps the MPRE, like the SAT, might be one factor contributing to the diversity crisis in the legal profession.\(^11\) It would be surprising if religious minorities scored as well on the MPRE as those with a Judeo-Christian background.

Third, and finally, the religious nature of the ABA Model Rules has a direct effect on lawyers who have finished law school, passed the bar, and are practicing law. Every state has adopted some form of the ABA Model Rules.\(^12\) Above all, these Rules form the basis for


\(^11\) See supra note 3.

disciplin ary action against lawyers. This means that lawyers can be sanctioned, suspended, and disbarred based on these Model Rules. If the Rules are, in fact, religious rules based on a religious text, than lawyers are being sanctioned, suspended, and disbarred based on religious standards. More specifically, they are being sanctioned, suspended, and disbarred based on biblical ethical norms. This may be acceptable in a country and a profession that reflects a Caucasian, Judeo-Christian majority. However, if this is the decision the profession chooses to make, it should be expressly done and with a full understanding of the implications of such a decision. If not, then perhaps it is time to re-examine not only the Model Rules themselves, but also the religious composition of the commissions that make the Rules, and the committees who enforce them.

Given the significant effect that the religious nature of the Model Rules can have on law students, bar applicants, and practicing lawyers, it is time to change the way the profession thinks and talks about religion and legal ethics. Most of the discussion to date has centered on how to reconcile one’s own religious morals with the codes of professional conduct. A great deal of the recent writing on religion and legal ethics has come out of two large symposiums, one at Fordham University Law School in 1998 called “The Relevance of Religion to a Lawyer’s Work: An Interfaith Conference,” and one at Texas Tech University School of Law in 1996,

13 An analogy can be made here to the discussion surrounding “In God We Trust” or “One nation, under God.” See, e.g., Evelyn Nieves, Judges Ban Pledge of Allegiance from Schools, Citing ‘Under God,’ NEW YORK TIMES, June 27, 2002; Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004). Despite the occasional public objection, we seem to have decided as a society that we allow, if not even prefer, statements of our majority’s faith to inform the lives of our religious (or non-religious) minorities. Many argue that, given the Judeo-Christian origins of our country, this is only to be expected. I take no position one way or the other in this comment. My only concern is that we, as a profession, engage in an open and honest discussion, and make the decision consciously, as opposed to passively acquiescing to rules we do not realize are religious by nature. See also Nelson Happy & Samuel Pyeatt Menefee, Genesis!: Scriptural Citation and the Lawyer’s Bible Project, 9 REGEN T. L. REV. 89 (1997).

heralded as a “Faith and Law Symposium.”\textsuperscript{15} The reconciliation of personal beliefs with the Model Rules of Professional Conduct is certainly a valuable conversation in which to engage. However, the discussion is missing an essential element by not asking the right question. It should not be: “How does a professional reconcile his or her religion with the Model Rules?” but rather “What is the religion of the profession’s Model Rules?”\textsuperscript{16} Only after answering the second, more basic, question can the profession discuss reconciling itself to those beliefs inherent in the Rules. It is impossible to discuss the place of religion within legal ethics, particularly for those who identify outside the Judeo-Christian tradition, without owning up to the fact that the Model Rules of Professional Conduct are religious moral codes, based on biblical ethical values.

To prove this assertion, that the Model Rules are religious rules, will require a look into the legal profession’s past. In section II, there will be a brief history of the ABA Model Rules to show that the original ABA Canons were consciously based on the Christian Bible, specifically the Book of Proverbs. The discussion will continue, in section III, with the current Model Rules (post Ethics 2000). This will show how the Rules today are simultaneously an offspring of the original, psalm-based Canons, the product of a consciously religious commission, and reflective of specific biblical values, traceable to passages in the Old and New Testament. Finally, section III will continue the discussion from this introduction – how having religious Model Rules affect law students, bar applicants, and practicing attorneys. The conclusion in section IV will be a reminder that consciousness in the profession is the ultimate goal of this paper, not a call for

\textsuperscript{15} Id.

\textsuperscript{16} Another way to ask these questions might be: not “How do we reconcile our beliefs with the rules?” but rather “What are the beliefs of the rules?”
II. RELIGION AND THE HISTORY OF THE ABA MODEL RULES

The religious origin of the ABA Model Rules is no secret, but it is rarely acknowledged. It is imperative for the profession to explore and embrace this history, however, if it intends to be honest about the origin and nature of the current Model Rules. In this section, the history of the current Model Rules is examined. This is done specifically to highlight the way that Judeo-Christian Biblical ethics influenced the fathers of legal ethics, and then formed the basis of the first Canons, Codes, and then Model Rules.

A. Hoffman and Sharswood – The Founding Fathers

In its preface to the current Rules, the ABA makes reference to the work of David Hoffman and George Sharswood, the two founding fathers of legal ethics:

On August 27, 1908, the Association adopted the original Canons of Professional Ethics. These were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 as Professional Ethics, and from the fifty resolutions included in David Hoffman's A Course of Legal Study (2d ed. 1836).

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17 Relativism has been defined as “[a]ny view that maintains that the truth or falsity of statements of a certain class depends on the person making the statement or upon his circumstances or society.” Relativism, ENCYCLOPEDIA BRITANNICA http://www.britannica.com/EBchecked/topic/496887/relativism (last visited March 8, 2010). Here I use the term in to indicate a view that a person’s ethical choices can only be judged by the standards of their own religious affiliation. A proponent of religious relativism in this context would argue that there is no universal standard of ethics by which to judge individuals who aspire to different religious ideals. I am not advocating for such a position. In fact, I find such a position untenable. Instead I believe transparency and conscious choice are more practically necessary in this context.

Both David Hoffman and George Sharswood used their Christian faith and the Bible to form the basis of their ethical guidelines for lawyers.

George Sharswood’s *Professional Ethics* quotes from the Apostle John on the second page of his article in order to establish “[t]here is one Lawgiver.” 19 Sharswood then goes on to assert that, although the moral rules established in the Bible were meant for the Israelites’ specific time and situation, they should serve as a guide when establishing the Canon of ethics for the legal profession:

> The Divine law is a deduction necessarily and mathematically certain as much so as any truth in geometry. Human law can aim only at such a probable deduction as results from a finite and imperfect knowledge. The system of law delivered by Moses to the Jews deserves, therefore, the most careful study at the hands of all who believe him to have been a divinely commissioned lawgiver… But one thing is as clear as a sunbeam, and that is a very important light to the student of Ethics; if God was the author of these laws, nothing morally wrong was commanded or allowed by them. 20

George Sharswood’s position as a Christian lawyer is thus explicitly clear. It is also explicitly clear that his religion, and specifically the “law delivered by Moses to the Jews,” (also known as the Ten Commandments) was his inspiration and his model for creating a system of legal ethics. 21

Similarly, David Hoffman, the other founding father referenced by the ABA, used his Christian faith and his Christian Bible to form his model ethical canons. In Hoffman’s *Course of

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19 “It is the noblest work in which the intellectual powers of man can be engaged, as it resembles most nearly the work of the Deity… ‘There is one Lawgiver,’ says the Apostle James. Not that the Supreme Being is the sole universal lawgiver in the sense of a creator of law, whose will alone determines the boundaries of right and wrong. God is the creator of the beings who are the subjects of law. He is the author of law-the one lawgiver-in the same sense that he, who first discovered a plain figure, may be said to be the author of all theorems, which may be predicated of it.” George Sharswood, *An Essay on Professional Ethics* vi (2d ed. 1860), http://www.heinonline.org/HOL/Page?handle=hein.beal/esype0001&id=1&size=2&collection=beal&index=beal/esype.

20 *Id.* at xii.

21 *Id.*
Legal Study, which the ABA specifically references in their preface to the Model Rules, the syllabus began with “1st: The Bible.” He states:

We have been thus particular on the subject of the utility of the Bible to the lawyer, from a deep conviction that its ethics, history, and law cannot fail of being eminently serviceable to him; from our observation that young lawyers frequently read any other book but this; and lastly, from the fact, that nearly all the distinguished lawyers with whom we have been personally, or through the medium of books, or otherwise acquainted, have not only professed a high veneration for biblical learning, but were themselves considerably versed in it.

Hoffman is careful, however, not to get lost in a general statement of his Christian faith as it relates to his course of legal study. Instead, he specifically relates the study of the Bible to his course on morality and to the project of creating moral law in America:

The purity and sublimity of the morals of the Bible have at no time been questioned; it is the foundation of the common law of every Christian (sic) nation. The Christian (sic) religion is a part of the law of the land, and, as such, should certainly receive no inconsiderable portion of the lawyer’s attention. In vain do we look among the writings of the ancient philosophers for a system of moral law comparable with that of the Old and New Testament.

Hoffman clearly came from a distinct historical moment. Some people today would even question the assumption that America was (or is) a “christian (sic) nation,” let alone whether the Bible is still the “foundation of the common law” of the United States. However, for Hoffman, the fundamental importance of the Bible to law and lawyers in general could not be overstated, and it formed the basis and first reading for his Course of Legal Study.

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22 David Hoffman, A Course of Legal Study: Addressed to Students and the Profession Generally 59 (Thomas, Cowperthwait & Co., 2nd ed. 1846).
23 Id.
24 Id. at 71
25 Id.
26 Id.
In addition to the *Course in Legal Study*, Hoffman taught a course on legal ethics in 1829 at the University of Maryland.\(^27\) When he “published the United States' first course on legal ethics” from this class, “his reading list began with the book of Proverbs from the Old Testament.”\(^28\) According to Professor Gordon Beggs, Hoffman’s “selection of Proverbs reflected the primary role of the Judeo-Christian ethic as the source of morals for the nation at that time.”\(^29\) Beggs describes in detail the way that the Old Testament book of Proverbs informed not only Hoffman’s views, but also those of Sharswood.\(^30\) Beggs quotes the specific passages from Proverbs that are applicable to each ethical obligation of “justice, purity, mercy, humility, honesty, candor, truthful testimony, and civility” that were espoused by Sharswood and Hoffman in their first legal ethics treatises.\(^31\)

For example, to illuminate what Hoffman and Sharswood meant by “justice,” Beggs returns to Proverbs 1:3, 10:9, 11:11, 13:11, 16:19, 28:20, 30:8 and he specifically quotes from Proverbs 29:26, which reads “[m]any seek an audience with a ruler, but it is from the Lord that man gets justice.”\(^32\) Thus, although many of these ethical ideas may be present in any religion, Beggs illuminates how Hoffman and Sharswood were not alluding to general human themes, but specifically defined Biblical principles of ethics. Sharswood and Hoffman not only based their

\(^30\) Id.
\(^31\) Id. at notes 50-87. In this article, Beggs makes a very interesting argument for the return to Hoffman’s kind of ethics rules, specifically informed by the Proverbs of Soloman, which he believes give lawyers a good basis for ethical behavior.
\(^32\) Id. at note 41.
theories of legal ethics on Judeo-Christian biblical morals, but that they actually drew their legal ethical code from the book of Proverbs.

B. Canons and Codes

This direct religious heritage in the field of legal ethics would not be remarkable had Hoffman and Sharswood’s influence ended with their historical moment. However their religious principles live on in all the reincarnations of the ABA standards of ethics: first the Canons, then the Codes, right through into the modern Model Rules.

The ABA readily admits in the preface to the modern Model Rules that the publications of Hoffman and Sharswood formed the principle basis for the first set of written standards of ethics, the ABA Canons:

On August 27, 1908, the Association adopted the original Canons of Professional Ethics. These were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 as Professional Ethics, and from the fifty resolutions included in David Hoffman’s A Course of Legal Study (2d ed. 1836). Piecemeal amendments to the Canons occasionally followed.33

It has already been shown that the legal ethical principles of Hoffman and Sharswood were based on Biblical ethical norms. Thus, by the transitive property, the book of Proverbs formed the principle basis for the first ABA Canons of ethics.

The argument has been made that “[w]ith the adoption and revision of formal codes of ethics, the emphasis that Hoffman and Sharswood placed on moral principles has, over time, given way to an effort to regulate professional conduct by increasingly detailed prescriptive norms.”34 However, despite these increasingly prescriptive norms, the biblical moral bases of

34 Beggs, supra note 29, at 832-833.
the legal ethics rules remain. These ethical obligations have been revised over the years, but they still contain the same biblical morals at their base.\footnote{35 It would be impossible here to discuss in detail every step of the development of the ABA Model Rules. I will therefore focus only on some key turning points in the history, when it would have been most likely that the biblical remnants of Sharswood and Hoffman would have been eliminated.}

Leonard Niehoff describes the developmental history of the ABA Model Rules as attempting a conceptual shift from “aspirational” concepts to a “morality of duty.”\footnote{36 Leonard M. Niehoff, In the Shadow of the Shrine: Regulation and Aspiration in the ABA Model Rules of Professional Conduct, 54 WAYNE L. REV. 3 (2008).} This distinction was originally put forward by Lon Fuller in a series of lectures given at Yale Law School in 1963.\footnote{37 Id. at 8.} According to Niehoff, “Fuller understood the morality of aspiration to be the morality of excellence. He recognized that this morality could influence law but maintained that it could not serve as law’s direct object. In contrast, Fuller understood the morality of duty to be the proper subject for law.”\footnote{38 Id.} Niehoff explains that the early ABA Canons of Ethics, based on Hoffman and Sharswood, were in time considered too “aspirational” in nature to satisfy their practical obligation as sources of discipline.\footnote{39 Id. at 9.} Thus, in 1969, the ABA commissioned a new ABA Model Code of Professional Responsibility, which would update the “aspirational” Canons, passed down from Sharswood and Hoffman, with more prescriptive language. Niehoff describes the result as follows:

After each Canon appeared a series of numbered “Ethical Considerations.” The Preliminary Statement described these provisions as “aspirational in character,” cautioned that they were not mandatory, and indicated that they “represent[ed] the objectives toward which every member of the profession should strive.” The Ethical Considerations thus presumably reflected Fuller’s morality of aspiration. The Code left for last the “Disciplinary Rules,” which were described as stating “the minimum level of conduct below which no lawyer can fall without being subject to disciplinary
action.” Unlike the Ethical Considerations, the Disciplinary Rules were mandatory. And these rules, of course, were intended to embody Fuller’s morality of duty.  

The 1969 Code thus attempted to keep the “aspirational” concepts that began with Hoffman and Sharswood, and also create corresponding mandatory moral duties. It is important to note that even as the rules of ethics moved toward more prescriptive norms, the drafters attempted to keep the “aspirational” aspects of the Canons intact. Although the language was modernized, the aspirational concepts were the same as those espoused by Sharswood and Hoffman. The direct biblical references were no longer present, but the concepts from the Bible were still there: the Judeo-Christian interpretations of “justice, purity, mercy, humility, honesty, candor, truthful testimony, and civility” that Beggs, through Sharswood and Hoffman, was able to tie directly to the Old Testament book of Proverbs.  

For example, it is possible to see this pattern in the history of one of the ABA Codes from 1969. As Niehoff explained, a set of disciplinary rules was found at the end of each Code. These rules were mandatory, forming the hypothetically “prescriptive” section of the Code. DR-701 and DR-702 are two such disciplinary rules, found at the end of the ABA Code on competent representation. The code regulates the limits of “Representing a Client Zealously” and requires that “A lawyer shall not intentionally… Fail to seek the lawful objectives of his client through reasonably available means.” The Code restrains this zealous advocacy, however, by forbidding a lawyer to “File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.”

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40 Id. at 8-9.
41 Beggs, supra note 29, at 831.
42 Niehoff, supra note 36, at 8-9.
Niehoff explains how this concept appeared in the earlier incarnation of ethical standards, the ABA Canon 15. That Canon stated “The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.” However, that Canon also contained a similar limitation on zealous advocacy to the one found in its preceding Code, stating:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client’s cause.

Thus, the later Code, which contained DR-701 and DR-702, is a direct reincarnation of the earlier Canon 15.

Beggs adds to this discussion by tracing the principles inherent in this Canon back to Sharswood, one of its original authors. Beggs explains that “[a]ccording to George Sharswood, selective practice also includes dissuading an eager client with a meritorious claim whose prosecution is not in the client's overall best interest.” Beggs continues to point out that this conclusion of Sharswood’s is traceable directly to Proverbs 25:7-8, which reads “What you have seen with your eyes do not bring hastily to court, for what will you do in the end if your neighbor puts you to shame?” Additionally, “Sharswood notes that ‘a very important part of the advocate’s duty is to moderate the passions of the party, and where the case is of a character to justify it.’” This teaching corresponded to Proverbs 29:9, which warns “If a wise man goes to

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45 Id. Niehoff explains the modern version of this Code, Rule 1.3 has been through several incarnations, eventually substituting “zealous representation” for “reasonable diligence,” but that the aspirational concepts are still easily apparent. Id. We will explore this modern incarnation a little later in the paper.
46 Id.; CANON OF PROF'L ETHICS Canon 15 (1908).
47 Id.
48 Beggs, supra note 29, at 838; See supra text accompanying note 33.
49 Beggs, supra note 29, at 838.
50 Id.
court with a fool, the fool rages and scoffs, and there is no peace.”

Thus, tracing the religious thread backward through history, it has been possible to determine the Biblical origins of DR-701 and DR-702. The way that the prescriptive ABA Codes grew out of, and corresponded to, the “aspirations” of Hoffman’s Canons and the religious principle of the Bible is therefore apparent both in the history of ethical standards, and in the actual language of the standards themselves.

III. RELIGION AND THE CURRENT MODEL RULES

Our current ABA Model Rules of Professional Conduct continue to exhibit the “aspirational” religious concepts of the original Canons. This means that, despite a move toward even greater prescriptive language, the Model Rules of today still exhibit the religious origins and principles of Hoffman and Sharswood. In addition, the modern reincarnations of the first ABA Commission on ethics, exemplified by the Ethics 2000 Commission, continue to openly discuss religion, and allow it to influence their interpretation and creation of the legal ethics standards.

A. The Bible in the Model Rules of Professional Conduct

Many believe that the 1969 Code, discussed above, was still not practically workable as a set of disciplinary rules for the legal profession. So, in 1983, the ABA adopted the Model Rules of Professional Conduct. These were modified further in 2003 on the recommendation of the Ethics 2000 Commission, forming the Model Rules as they appear today. Nathan Crystal has

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51 Id.
52 Niehoff, supra note 36, at 10.
53 Id.
noted that “the history of the model rules shows that the drafters intended to largely eliminate aspirational concepts.”

Professor Niehoff disagrees, however:

This article, however, contends that aspirational modeling persists in the Rules. Granted, this idealism does not manifest itself uniformly throughout the Rules. To the contrary, it takes different forms, affects some rules more than others, and raises concerns of varying kind and magnitude. This article maintains, though, that in the examples discussed here this aspirational thinking has significant implications.

In his article, Niehoff uses examples from the ABA Model Rules to show how the aspirational concepts and language from the Canons are still present in the Rules as they appear today. He explains that “[i]n light of this history, we might expect to have difficulty discovering in the Rules any lingering confusion between regulatory and idealistic thinking. It nevertheless turns up immediately and conspicuously.” The examples he uses to prove this assertion include: the Preamble, Rule 6.1, the Diligence rules (including Rule 1.3 and 1.6), Organizational Clients and Clients with Diminished Capacity (including Rule 1.13 and 1.14), Advisor rules (including Rule 2.1, 1.4, and 5.4), and several state rules.

Niehoff’s examination of Model Rule 1.3 is particularly informative. The Rule requires “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” Niehoff explains that Rule 1.3 has been through several incarnations, and prior versions included the words “zealous representation” in the place of “reasonable diligence.” However, Comment

56 *Id.* at 11.
57 *Id.* at 11-25. It would be impossible for this article to re-create all of Niehoff’s examples, and so this article must rely on his scholarship for the offer of proof that there are a great number of aspirational concepts still present and readily apparent in the current Rules.
58 MODEL RULES OF PROF’L CONDUCT R. 1.3 (2009).
59 Niehoff, *supra* note 36, at 12. Niehoff gives significance to this last shift in wording in the latest version of the Rule, which moves the “zealous” language to the comment rather than the Rule, itself. However, whether the language appears in the rule or in the comment does not particularly matter to me. I still believe that the religious and aspirational principles are as apparent, and historically traceable, regardless of where the language appears.
1 to the Rule continues to include the former language, stating that “[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.” The “idealistic notion of “zealous” representation that had been required by Canon 15” is thus apparent in Model Rule 1.3 and its first comment.

The historical chain discussed in the previous section is now completed in Model Rule 1.3. What started with Proverbs, Sharswood, the Canons, and Codes, is still apparent in current Model Rules. These aspirational concepts are thus traceable, through the history of the ABA Canon, Code, and Model Rules, directly back to the inspiration of Hoffman and Sharswood. The religious and aspirational language used by those two founders came directly from the Bible, and most notably the Proverbs of Solomon. Therefore, if there are still aspirational words and concepts in the modern Rules, as Niehoff has showed, then there are still Jude-Christian, biblical concepts present in the modern Rules.

As further proof of the biblical nature of the current Model Rules, it is instructive to look at a study done by two professors at Regent University School of Law, entitled Professional Responsibility and the Christian Attorney: Comparing the ABA Model Rules of Professional Conduct and Biblical Virtues. This study was undertaken “to demonstrate to what degree the ABA’s creation is compatible with biblical morality,” but it actually provides a comprehensive and detailed example of how the ABA Model Rules reproduce biblical morality. The authors very carefully, in more than 90 pages, go through every single rule in the ABA Model Rules. They identify the core concepts inherent in the rule, and then identify and discuss the relevant biblical passages. For example, when discussing Rule 1.3, discussed above, the authors cite

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60 Id.
61 Id.
62 See supra text accompanying notes 41-51.
63 Gantt, supra note 8.
64 Id. at 5.
Corinthians 3:5, Romans, 12:8 and 12:11, Deuteronomy 19:18, Timothy 2:21, and of course Proverbs. 65

It is no surprise that modern biblical scholars, whom the professors at Regent University most certainly are, would find an implicit reference to Proverbs in Rule 1.3. History makes it clear that not just the Bible, but Proverbs specifically, was used by Hoffman and Sharswood to create the first ABA Canon. It is also apparent, thanks to Beggs and Niehoff, that the aspirational (read: religious) nature of that first Canon carried through the ABA Codes and into the modern ABA Rules. Thus, all a biblical scholar need do today is pick up the subtle clues, left in the aspirational language of the Rules, to trace the rule back to its biblical origins. For this reason, the passages from the Bible that the Regent University authors cite as compatible with the ABA Model Rules could just as easily be the unacknowledged basis of the Rules themselves, given the biblical ancestry of the Rules. This is especially important because the Regent University authors find relevant biblical passages for more than just the Rules exemplified by Niehoff, but for every single rule in the ABA Model Rules of Professional Conduct. This would seem to indicate that there are biblical clues to be found in all the Model Rules.

B. The Bible in the Ethics Commissions

Again, it is not surprising to find the Judeo-Christian religion in the Model Rules, when looking at the composition of the committees who create the Rules. Aside from the original, clearly religious committee that included Hoffman and Sharswood in 1829, there have been deeply religious lawyers of various Jude-Christian denominations on the ABA Commissions right through to the Ethics 2000 Commission, working to align the ABA Rules with their own

65 See Id. at 6-9 and footnotes 13-16. Again, it would be impossible for me to re-create all of the examples in this incredibly long and detailed article. I must, therefore, rely on this one example and ask the reader to please examine the article in its entirety for further proof.
religious beliefs. As an example, Susan R. Martyn is admittedly a devout Lutheran and was on the Ethics 2000 commission.\(^{66}\) In her article, *Are We Moving in the Right Direction? Sadducees, Two Kingdoms, Lawyers, and the Revised Model Rules of Professional Conduct.*\(^{67}\) Martyn opens her discussion with a quotation from Luke 20:27-38, and includes an extensive discussion of the Sadducees, Luther, and the “two Kingdoms” before stating:

> We Lutheran Christians know that we are not justified by good works, that faith alone makes them possible. At the same time, we know that faith calls us into the world, to serve others and glorify God in our ordinary places of responsibility. We need more courage to voice the truths we recognize, not just with fellow Christians in the biblical language of God's kingdom, but also to all in a secular tongue. The laws I advocate or administer are simultaneously a testimony to the goodness of creation and the depravity of human selfishness.\(^{68}\)

In addition, Martyn uses the pronoun “we” when discussing the commission’s decisions on individual Model Rules while simultaneously discussing how individual Rules consciously harmonize with Lutheran principles.\(^{69}\) For example, in a section titled “Walk Humbly with Your God,” Martyn discusses how Jesus’s encounter with the Sadducees informs the need for humility. She continues to explain that “[a] good example of the need for humility in the work of Ethics 2000 concerns our deliberations about Model Rule 4.2, which prohibits contact by lawyers with represented persons unless ‘authorized by law.’”\(^{70}\)

> Martyn explains that “[t]his rule has devoured a greater number of hours in Ethics 2000 than any other. The reason: self-interest and hubris.”\(^{71}\) Martyn continues, relating a long history of discussion surrounding Rule 4.2. She explains that by adding the “unless authorized by law”

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\(^{67}\) Id. at 132.

\(^{68}\) Id.

\(^{69}\) Id.

\(^{70}\) This is not to suggest that all the members of the 2000 Commission were Lutheran, but merely to point out that Martyn felt a certain community with her commission members, perhaps because they shared similar, Judeo-Christian values.

\(^{71}\) Martyn, *supra* note 66, at 168.
provision to Model Rule 4.2, the Ethics 2000 commission was attempting to respond to a long standing debate over exceptions to the general rule that “a lawyer must speak to a represented person only by speaking to that person’s lawyer.” Martyn states that by adding the authorization clause, the Ethics 2000 Commission made a conscious choice to give up the commission’s own power to decide where the exceptions to the rule should lie, instead “[d]eferring to judges” to make that decision on a case by case basis. The deference the Ethics 2000 Commission showed to the judges was, as Martyn relates it, an attempt to inject “humility” into Model Rule 4.2, in order to combat the “self-interest and hubris” that plagued the debate about the Rule and its exceptions. Martyn explains that “[w]e, like the Sadducees, always see dimly. As God’s instruments in a sinful world, we need to wear hubris monitors that continually alert us to the folly of our own wisdom.” Thus, Martyn exemplifies how Biblical passages (in this case, the story of the Sadducees, found mostly in the book of Luke) influenced the Ethics 2000 Commission’s revision of the Model Rules.

Thus, there is a modern parallel between Hoffman’s first ABA Commission’s use of Biblical ethical norms and Martyn’s Ethics 2000 Commission’s use of Biblical ethical norms. Although it appears in more subtle language and concepts, the influence of Judeo-Christian religious figures on standards of legal ethics remains just as strong today as it was 160 years ago. This is perhaps exacerbated by the fact that the ABA Commissions are most often comprised of

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72 Id.
73 Id. Martyn explains that the Commission understood that “[d]effering to judges in tough cases may increase administrative effort, but we believe it is worthwhile to require those seeking contact with represented persons to justify their reasons, and let a judge determine whether a contact initiated by an opposing party is voluntary, knowing, and the product of true informed consent.” Id.
74 Id.
75 Martyn, supra note 66, at 164.
those with entirely Judeo-Christian backgrounds.\textsuperscript{77} This trend continues with the current commission, “Ethics 20/20,” which is also comprised almost entirely of individuals with Judeo-Christian backgrounds.\textsuperscript{78} Whether it is implicitly or explicitly done, these commissions are certainly going to align the Rules with their own beliefs of right and wrong. If these beliefs are always of Judeo-Christian origins, than the Model Rules will necessarily reflect Judeo-Christian morals. This may not be as explicit as it was in Hoffman’s case, but as the Regent University professors have proved, the subtle clues are there to be found. And, if Martyn’s example is any indication of a general trend, the clues are laid in full consciousness.

Together, this means that the Model Rules are not only the direct ancestors of admittedly religious rules, but continue to have the same religious significance today. These rules were created by biblical scholars, out of biblical passages, to encourage Christian ethical behavior. The religious aspirations of the legal ethics tradition continued through several reincarnations of ABA Canons and Codes and are still apparent in the ABA Model Rules today. As proof of the Model Rules’ continuing religious nature, Christian biblical scholars can today link every single ABA Rule to a passage from the Bible. Finally, the individuals on the ABA Commissions, and the very composition of the Commissions themselves, work to encourage this fundamental Judeo-Christian nature of the Model Rules, ensuring that they continue to encourage Judeo-Christian ethical behavior. For these reasons, the Model Rules are religious rules.


IV. Why Religion in the Rules Matters

As the introduction indicated, the religious nature of the Model Rules has a material effect on the legal profession in three different ways, at all three of the major stages of a lawyer’s career: law school, admission to the bar, and practice. At all three of these intervals, the Judeo-Christian basis and biases of the Model Rules have the potential to either enrich or alienate, based on an individual lawyer’s religious background. This mercurial combination undermines the stability of the Rules, and thus undermines one of the major justifications for a national, codified set of Model Rules (namely the stability and uniformity they are supposed to provide). For this reason, the profession must choose either to openly embrace these religious rules and the biases they entail or attempt to diversify and compensate for their Judeo-Christian centricity in each of the three affected stages of the profession.

A. Law School

First, there is the law school experience. As discussed above, every accredited law school in the United States now requires every law student to take and pass an ethics class that discusses the ABA Model Rules, usually for about three hours a week, for about 14 weeks.\(^79\) This is the same amount of time that most students spend in their first year learning contracts, property, or torts\(^80\). The profession has thus elevated the study of ethics and the ABA Model Rules to the same level importance as, say, the Uniform Commercial Code, or the Estates System. In most non-ethics courses, the history of these codes (legislative and otherwise) is not only discussed but also regularly cited and used, but taught as an adversarial tool. Every

\(^79\) Standards for Approval of Law Schools, supra note 5, at 23.

\(^80\) Id.
potential bias, unclear word, prior incarnation, and editorial comment of these codes was scrupulously examined and exploited for various arguments as part of the learning and teaching process.\footnote{For a prime example of this style of teaching, using the Uniform Commercial Code, See Monroe Freedman, CONRACTS, AN INTRODUCTION TO LAW AND LAWYERING (Hofstra University Law School, 2008) (unpublished casebook) (on file with the author); Monroe Freedman, CASES AND MATERIALS ON CONTRACTS (American Casebook Series, West Publisher, 1973).}{81}

Why, then, if law schools are going to give them the same time and attention in the legal curriculum, should this same method not be employed with the ABA Model Rules of Professional Conduct? Shouldn’t students examine the legislative history of the Rules? This would bring an ethics class to a discussion of Sharswood and Hoffman and the aspirational, religious inheritance of the current Rules. Shouldn’t students discuss (or at least acknowledge) the texts from which the Model Rules were developed, and to which the writers looked to solve ambiguities and inform the meaning of the Rules? This would lead them to a dialogue about the role of the Bible, and especially Proverbs, in the development of the Rules, the terms they employ, and the behaviors they attempt to elicit. Shouldn’t future lawyers exercise adversarial skills by attempting to exploit weaknesses, expose problems, and either utilize or attack inherent biases in the Model Rules? This might inspire a conversation on the Rules’ potential for religious exclusion, disproportionate discipline, or even just subtle reinforcement of the profession’s ethnic status quo.\footnote{See supra note 2.}{82} Why not engage in these discussions and thereby utilize the same analytical skills fostered in other law school classes?

Lucia Ann Silecchia suggests that the skittishness to do this derives from the difficulty, ambiguity, and personal nature of religion in general, as well as the academy’s desire to remain
objective and analytical. Silecchia cautions that “the mere fact that these are difficult questions, however, does not mean that spiritual issues should be avoided in law school life. Quite the contrary. Indeed, there is a danger in avoiding such issues…” Silecchia specifies one such danger specifically in legal ethics courses:

[A]s students begin to study professional ethics, they face profound questions about the morality of the profession and the roles they are called to play. They are also confronted with the pressing and troubling questions concerning potential differences between their personal beliefs-- which may be rooted in spirituality--and the beliefs incorporated in their professional ethical codes. To the extent that these are disconnected, spiritual difficulties may surface for the first time.

However, if there were an open, historical, and skeptical confrontation of the Model Rules in an ethics class, a professor might avoid causing a student who is outside the Rules’ Judeo-Christian tradition the kind of personal spiritual crisis against which Silecchia warns. But causing a private, spiritual crisis among students with a background outside of the Judeo-Christian norms espoused by the Model Rules is only one of the potential dangers of ignoring the Rules’ religious inheritance.

In addition to this potential alienation, by avoiding the type of historical, confrontational, and comprehensive analysis that law schools employ in other substantive classes, the conspicuous absence of it in legal ethics undermines the legitimacy and applicability of those very skills. If it is so important to teach students to dissect a statute, argue about the meaning of

84 Id. at 201. It should be noted that Silecchia is advocating a different kind of religious discussion than I am. She believes that religious discussion has a place in a law school classroom because institutions like the church and religious affiliation in general can benefit and enrich the experience of law school. To clarify, she encourages religiously-informed discussion in law school the way that a pastor or rabbi might, where as I am encouraging the type of discussion of religion that undergraduate history professor should include in a course on the medieval period. Whatever our differences, I believe the reason Silecchia gives for our avoidance of any religious discussion, and her warning of the subsequent dangers of that avoidance, are still valid and to the point. Although we disagree about why we should have the discussion, we agree on why we are not having the discussion.
85 Id. at 202.
ambiguous terms, expose potential problems in its application, and research and use its legislative history, then why not use those critical tools in legal ethics? Avoiding the application of those critical thinking skills, and the subsequent discussion that might result, indicates to a student, who is employing those skills and methods in probably four other classes over the course of the same semester, that either the skills themselves or the Model Rules are somehow suspect. Either way, the legal curriculum is undermined.86

Avoiding this kind of open, confrontational discussion about the history and religious nature of the Rules also deprives students of the opportunity to think about, comment on, and thus participate in, the reasons for self regulation that are an integral part of the legal ethics discipline. Lawyers create the professional rules that bind them, and taking ownership of that process is part of the legal ethics education. Critically examining the Model Rules in their entirety, without avoiding any messy historical or religious questions, would allow students to participate in the process of evaluating, and most importantly, improving the Rules that are created by the profession, and for the profession, they are training to enter. It is imperative, therefore, to be open about some of the most basic history and nature of those Rules, so that potential reformers might have all the information they need to either adopt or modify those Rules. Just as any judge needs the whole case history before making a decision, so a student and

86 There is a counterargument that a legal ethics course is fundamentally different than other, “substantive” law courses. However, I am not ready to concede this point. In a contracts class, students are taught the general, substantive law of contracts. They also learn and practice the skills of interpreting and applying the UCC to cases and problems. In an ethics class, students are taught the general, substantive law of ethics (embodied in the Model Rules). They work to interpret and apply the Model Rules to cases and problems, just like they do for the UCC in a contracts class. Given these similarities, it seems that similar strategies of dissecting and translating the statutes should be applied in both classes. Additionally, the abstract moral concepts discussed in an ethics class are no more or less difficult and “fuzzy” than concepts like equality and fundamental fairness, discussed in a constitutional law class, for example. For these reasons, I see no relevant difference between an ethics class and any of the other required law school classes.
a lawyer should have all the information before they take ownership of the self-regulation process known as legal ethics.

Currently, the word “religion” does not appear in any of the major text books used in ethics courses. Given the way that religion forms the historical foundation of the Rules, maintains a position of prominence for the current rule commissioners, and informs the language and principles espoused by the current Model Rules, religion permeates the discussions in classrooms already. The trouble is that this religious undertone is present without students or professors being aware (at least explicitly) of its existence. For example, a professor may discuss the history of the Canons and Codes, as predecessors to the current Model Rules, but never mention Hoffman, Sharswood, or the Bible.

Students are talking about religion without knowing it, in a profession where investigation, cross-examination, and source-citation are so necessary; this willfully ignorant discussion is unacceptable. The profession must begin an open dialogue of these matters in the law school classroom immediately. Otherwise, there is a risk of alienating students, potentially causing them spiritual crisis, undermining the basic legal skills taught throughout the rest of the law school curriculum, and misinforming or failing to inform the future self-regulators of the

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88 This is an example from my own experience. Another is that Rule 1.3 could be discussed without any mention of how the ideal of diligent and/or zealous representation dates back to a Biblical ethical norm enunciated in Proverbs. This may not seem significant when we look at the Biblical history of only one rule, but when you consider the entire scholarship of Niehoff and Gantt, see supra section III(A), which applies to all the Model Rules, this becomes a much larger oversight.
legal profession. For these reasons, the religious nature of the Model Rules matters in law school.

B. Admission to the Bar

Second, the religious basis of the Model Rules affects admission to the bar. All but three states require aspiring lawyers to pass the Multistate Professional Responsibility Examination (MPRE). The stated purpose of the MPRE is to test a student’s knowledge of “professional conduct currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct.” This is accomplished with 50 multiple choice questions administered over the course of 125 minutes. The MPRE questions ask students to label a fact pattern with a number of different evaluations. The student must identify whether a lawyer might, given the fact pattern provided, be “subject to discipline,” “subject to litigation sanctions,” “subject to disqualification,” “subject to civil liability,” “subject to criminal liability,” or whether conduct would be “proper” allowing that the lawyer “may” act in the way the question describes.

It is this last option that might present a problem for many test takers outside the Judeo-Christian tradition. The MPRE is, by its own admission, a limited test that does not attempt to evaluate an individual’s moral compass, but only an individual’s ability to learn and apply the Model Rules. As one historian of the test noted “[p]assing the test does not signal that the successful examinee will be an ethical practitioner; ‘The most unethical individual in the world

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89 Bar Admission Requirements, supra note 8, at 21, Chart VI.
91 Id.
92 Id.
can study the code and tell you what it is they are not supposed to do.”93 This is perhaps another way of saying that anyone, even someone totally unfamiliar with Judeo-Christian ethical language and norms, could memorize the ABA Model Rules and succeed on the test. This may be true, but the greater likelihood is that an individual who is not deeply (culturally and perhaps even unconsciously) familiar with the language, history, and principles of Judeo-Christian ethics will not be able to evaluate in 2.5 minutes whether an action would be considered “proper.” For example, a Buddhist considering which is the “proper” action for a lawyer in any given situation is going to consider the effect that such an action will have on her karma,94 her “universal responsibility,”95 the writings of her Dalai Lama,96 and the stories she knows from the Way of the Bodhisattva.97 However, such a test taker will then have to push these instinctual responses out of her mind if she is to be successful. On the other hand, a Christian test taker, versed in the Judeo-Christian Bible, the stories from Proverbs and Luke, and the Christian interpretation of words like “zealous” will be able to use this information to identify with and more easily answer the question of what is “proper” for a lawyer in the given situation.

Several years ago, there was widespread uproar about the racial bias of the SAT college admission test,98 which offers a useful analogy to the potential for bias in the MPRE that this article describes. Studies by Roy O. Freedle and several other prominent researchers proved that

94 The Dalai Lama explains that “Karma is a Sanskrit word meaning ‘action.’ The inference being that the outcome of future events can be influenced by our action.” HIS HOLINESS THE DALAI LAMA, ETHICS FOR THE NEW MILLENNIUM 136 (1999).
95 Id. at 161.
96 See generally Id.
the words used on the verbal section of the SAT test favored white, middle-class to affluent males.99

The extensive work of Diaz-Guerrero and Szalay (1991) illustrates the different implications of common vocabulary use. They report on the different associations of African Americans, Whites, Mexicans, Puerto Ricans, Colombians, mainland Chinese, and Hong Kong Chinese for a wide array of commonly used words, such as “friend,” “love,” “sex,” “religion,” “education,” and “money,” as well as an array of less commonly used words, such as “communism” and “capitalism.” They present graphics and various similarity measures that reveal the degree to which ethnic groups differ in their associations for particular words. For example, the African American and White groups disagreed strongly in their responses to frequently used words such as “goals,” “desires,” “valuable,” “justice,” “progress,” “society,” and “class.” On the other hand, African Americans and Whites agreed strongly on other terms, which happened to be words with low frequency of occurrence, such as “capitalism” and “communism.”100

As Freedle explains, different populations are thus proved to respond differently to common words. Freedle states that this is because common, “easy” words (like “friend” and “religion”) often have many more meanings (five dictionary entries on average) than words that are used less often (like “vehemence” or “anathema”) and have fewer meanings (two dictionary entries on average).101 The more potential meanings a word has, the more that the word’s context matters in determining its meaning. When there is no context, or when that context is cultural, then the primary meaning of the word can be shifted based on the cultural context that an individual’s background naturally gives it.

Thus, when a white, middle class, male question writer for the SAT uses a word like “religion” in a sentence, their culturally contextual definition of the word will be easily recognized by a white, middle class, male test taker. It will not be as easy for an African American test-taker to understand the meaning intended by the questioner, however, because their culturally contextual definition of that word will be different. The common word “religion”

100 Id. at 6-7.
101 Id. at 6.
will thus mean two different things to two different test takers from two different backgrounds. In the context of the SAT, this means that African Americans do statistically worse on the “easy” questions that contain “easy” (i.e. common and contextually determined) words. As Freedle explains:

hypothesis: (a) Performance on many easy verbal items is hypothesized to be highly dependent on the semantic sense of common words that are used in everyday conversation within a given community. Many easy verbal items tap into a more culturally specific content and therefore are hypothesized to be perceived differently, depending on one’s particular cultural and socioeconomic background. Thus, the cultural and lexical ambiguity that African Americans are hypothesized to experience when responding to many easy verbal items offers one promising explanation for why they and other minorities do differentially worse on at least the easy analogy and easy antonym items;102

By adding statistical research to this hypothesis, Freedle has been able to prove that these ethnic, cultural, and contextual differences in the common definitions of words directly and negatively impact the scores of minorities on the SAT.103

There is no similar data available on the MPRE.104 However, the ethnic bias of the SAT seems to be directly analogous to a potential religious bias on the MPRE. If the mere meaning of the word “religion” can vary from culture to culture enough to negatively impact a student’s SAT score, than a difference in religious background must certainly change the contextual meaning of the word “proper” for the purpose of an MPRE question.105 Thus, a student with a

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102 Id. at 6-7.
103 Id.
104 This is partially because there is no national passage rate data available for the MPRE, as each state requires a different score. See National Conference of Bar Examiners, 2009 Statistics, http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2009_Stats.pdf (last visited March 8, 2010). The closest data available is from the ABA, and covers bar passage rate in general, of which the MPRE is only a part. However, the ABA has concluded that “Bar passage rates for racially diverse law students are generally lower than whites… Blacks had the lowest percentage rate, 77.6%.” American Bar Association, Resolution 113 (2006) www.abanet.org/leadership/2008/midyear/updated_reports/hundredthirteen.doc-2008-03-10.
Judeo-Christian background, facing an MPRE question that was written by a tester with the same Judeo-Christian background, must have an advantage over a student with an entirely different contextual ethical vocabulary.

It is true that anyone can study the ABA Model Rules, memorize the meaning given to them by the ABA, whether it is culturally familiar or not, and regurgitate it on the MPRE for a perfect score. However, this is the same argument that might be made against those who accuse the SAT college admission test of being racially biased. Any student could memorize the dictionary definitions of the common words that are used on the SAT or the MPRE, disregarding any cultural contextual definitions, and hypothetically obtain a perfect score. However, as Feedle’s research has shown, this simply does not occur. Perhaps it is the time pressure of the test and stress of the testing environment, or perhaps it is just physically impossible to memorize enough meanings outside of one’s natural cultural context. Whatever the reason, on these standardized tests, people revert to their most natural, cultural, and contextual understanding of a word’s meaning. Thus, it might be too much to ask someone outside the Judeo-Christian ethical culture to re-learn their natural understanding of the meaning of the word “proper” – Especially in 2.5 minutes. What seems more likely is that an individual outside the Judeo-Christian ethical culture, who does not share a common language, history, and set of principles with the questioner, will probably score lower on the MPRE.\textsuperscript{106}

Again, this may be something the legal profession is willing to live with, given its Judeo-Christian majority. If members of the profession have (implicitly or explicitly) chosen to be governed by a set of ethics rules that reflect Judeo-Christian biblical ethics, then one might (somewhat cynically) argue that there should be an exam that tests a student’s knowledge of

\textsuperscript{106} There is simply no data available to support or deny this hypothesis. Let this serve as a call for anyone with the necessary resources and knowledge to create such data.
those Judeo-Christian, biblical rules. However, the MPRE is one of the sentinels on the path to becoming a lawyer. Those who score too poorly on their MPRE will not be admitted into the legal profession. If the legal profession is attempting, as it seems from various efforts throughout the community,\footnote{See generally The ABA Commission on Racial and Ethnic Diversity in the Profession, \url{http://new.abanet.org/centers/diversity/Pages/Legalprofession.aspx} (last visited March 8, 2010).} to increase diversity among the population of lawyers in the U.S., then it might not want to use a test that was biased against those who do not have a Judeo-Christian ethical vocabulary.

\textit{C. Legal Practice}

Third, and finally, the religious nature of the ABA Model Rules has a direct effect on lawyers who have finished law school, passed the bar, and are out in the world practicing law. Because all of the states in the U.S. have adopted some form of the ABA Model Rules,\footnote{Dates of Adoption, \textit{supra} note 12.} the religious nature of those Rules has an effect nationwide. The most basic purpose of these Rules is to form the basis for disciplinary action against lawyers. This means that lawyers can be sanctioned, suspended, and disbarred based on these Rules – their language, the principles they espouse, and the behavior they attempt to elicit or suppress. If the Rules are, in fact, religious rules based on a religious text, than lawyers are being sanctioned, suspended, and disbarred based on religious standards, religious language, and religious principles. More specifically, they are being sanctioned, suspended, and disbarred based on biblical ethical norms.

As an example, look at Rule 1.6, governing confidentiality.\footnote{The rule reads: “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” Paragraph (b) includes 6 limited exceptions. \textit{See M.R.P.C. 1.6(b)(1)-(6).}} This rule, often considered one of the cornerstones of the legal profession, holds secrecy as the most important calling of a
lawyer. This edict appeared in the form of “Canon 37. Confidences of a Client” in the first ABA Canons of Professional Ethics which, remember, appeared courtesy of Sharswood and Hoffman in 1908. It has already been noted that these two authors based their theories of legal ethics first and foremost in the Bible, and quoted Proverbs in their first syllabus, outlines, and courses on legal ethics. And, as Professor Gant reiterates during his biblical examination of the current Model Rules (the direct decedents of that work by Sharswood and Hoffman):

In espousing the hallmark principle of attorney-client confidentiality, the rule highlights the biblical virtues of confidentiality and trustworthiness. Proverbs 11:13 exemplifies these principles; it reads, “A talebearer reveals secrets, but he who is of a faithful spirit conceals a matter.”

Thus, Rule 1.6 is just another example of a modern rule with significant Judeo-Christian biblical history, language, and principles embedded in it.

Imagine a scenario where Rule 1.6 might be used to discipline someone. A standard example used in legal ethics textbooks and classes across the country (often known as the “Missing Persons” problem) based on the case of People v. Belge out of New York. In that case, a defense attorney learned from his client the location of a body, belonging to a young girl who had been missing, and whose parents were not yet sure of her fate. When the father of the girl begged the attorney for information about his daughter, the attorney concealed what they knew. This was done in the name of protecting his client’s confidences. Now, change the

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110 See Model Rules of Prof’l Conduct R. 1.6(a) (2009).
111 ABA Canons of Prof’l Ethics, Canon 37 (1963).
112 See supra section II., notes 18-24.
113 Gantt, supra note 8.
114 See e.g. Lisa G. Lerman & Philip G. Shrag, Ethical Problems in the Practice of Law 164 (Wolters Kluwer, 2nd Ed 2008).
117 Id.
scenario slightly to imagine that instead of following the guide of Rule 1.6, the attorney had chosen to reveal to the begging father that his daughter was dead, and where her body could be found. If this information led to the discovery of the victim’s body, and that body led to the attorney’s client, then there would certainly be at least another murder charge against the client, and most certainly a cry for attorney discipline by that client. Under Rule 1.6, there would certainly be a case for disciplining the lawyer. None of the exceptions listed in section (b) of Rule 1.6 allow disclosure of a past crime. Preventing the emotional distress of a father does not qualify as preventing “reasonably certain death or substantial bodily harm” which is the only potentially relevant exception. Thus, there is an attorney who would be subject to discipline for violating Rule 1.6. This could result in that attorney being suspended, sanctioned, or even losing his bar license.

But why might that attorney have chosen to reveal information to the father? Imagine, for the sake of example, that this hypothetical attorney is also a devout Muslim. The Qu’ran

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118 The case was filed in 1976, and thus the ethical code cited at the time was Canon 37 of the ABA Canons of Professional Ethics. For the sake of this example, however, let us assume that the case was brought today, and thus Model Rule 1.6 would apply, as the direct decedent of Canon 37, which is no longer in use.

119 This would have also been in compliance with the health law that was in effect at the time, requiring anyone with knowledge of an unburied dead body to come forward. This was the law under which the attorneys were prosecuted in People v. Belge, and thus a disclosure of this kind would have actually been in line with at least one law on the books. 372 N.Y.S.2d 798 (N.Y.Co.Ct. 1975).

120 MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2009).

121 There are obviously any number of reasons an individual might choose to make this choice. Clearly the outraged public and the prosecutor in the Belge case thought that another choice was appropriate, and we have no information on the reasons for their choice. I offer my religious example obviously because it serves to illustrate the way that someone of a non Judeo-Christian faith might be affected, in practice, by Judeo-Christian rules of ethics, not because I believe it would be the only possible explanation for a differing view.

122 There is an obvious danger in providing an example. There are obviously a number of different sects and interpretations within Islam, just as there are in Christianity, Judaism, and indeed any religion. It is therefore next to impossible to predict how any one religious individual would respond to or interpret a situation. There are currently no statistics available to predict the number of lawyers in the US who are Muslim, let alone to which interpretation they might ascribe. I am providing the following hypothetical in the hope that it will generally illustrate my point, rather than provide a specific and certain instance of dissent, which is both impossible to predict, and necessarily flawed.
has a very strict stance on secrecy, discussing it in two main sections. The first is from Sūrah 4: *Al Nisā* (the Woman) and reads “In most of their secret talks / There is no good.”\(^{123}\) The second is found in Sūrah 58: *Al Mujādilah* (The Woman Who Pleads) and reads “Secret counsels are only / (Inspired) by the Evil One / in order that he may / Cause grief to the believers...”\(^{124}\) This displays a stark contrast to the language in Proverbs 11:13, which states: “A talebearer reveals secrets, but he who is of a faithful spirit conceals a matter.”\(^{125}\)

In addition to the specific Qur’ānic references above, Islam has a strong ethical covenant of its own, formed between man and God much like Christianity’s. This covenant was formed to encourage that which is known in Islam as the “maruf,” which literally means “good.”\(^{126}\) As John Esposito explains:

In Arabic, the meaning of maruf is essentially social in nature. It derives from the root *arafa* (to know) and literally means “that which is known.” As an ethical term, it signifies “known” or virtuous acts that are performed in the full light of day and thus do not need to be hidden away from a neighbor’s sight. This socially contextualized definition of good comes quite close to a practice that can be found in Mexico and parts of Central America, where the doors to village houses are left open so that neighbors can see that nothing shameful is going on inside. The antithesis of maruf, the semantic domain of secrecy and hypocrisy is expressed by the *munkar* (vice).\(^{127}\)

Thus, there is a clear tendency in Islam to favor the ethical choice that allows for the most openness and avoids secrecy. Thus, a choice that both involved secrecy and deception – a secret

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\(^{124}\) *Id.* at 58:10. It should be noted that the Qur’ân does allow for some exceptions, namely for gifts of charity, which might be better done anonymously, or “conciliation between men,” which might include privately settling an issue of embarrassment. *See Id.* at textual note 625 to 4:114. However, the intention is clear in the text that none of these exceptions would apply where maintaining a secret might cause harm to another.

\(^{125}\) Proverbs 11:13.


\(^{127}\) *Id* at 96-97.
which directly caused another community member direct harm – would be a very difficult choice for a devout Muslim to make.\textsuperscript{128}

Perhaps justification is possible, and a Muslim lawyer would be able to reconcile the choice that Rule 1.6 (and now the precedent of \textit{Belge}) mandates with some fancy religious footwork and alternative interpretations. It is therefore certainly possible that one could simultaneously be a devout Muslim and follow the ABA Model Rules. But that possibility does not diminish the fact that the rule itself aligns perfectly with a Judeo-Christian ethical perspective and the Biblical passages in Proverbs, but runs directly counter to Muslim ethical principles and specific passages in the Qur\textsuperscript{ā}n. It is also possible that the Muslim lawyer would not be able to reconcile these differences. It is therefore possible that such a lawyer would choose to honor the rule he perceives ordained by Allah over the rule ordained by the ABA. Were he to choose this path, his violation of Rule 1.6, just as in the example above, would almost certainly result in discipline.\textsuperscript{129} He could thus potentially lose his license to practice law because of his inability to reconcile his Muslim ethical principles with the Judeo-Christian principles espoused by the Model Rules.

In \textit{Belge} exemplifies this, as the court stated unequivocally that “[t]he effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship.”\textsuperscript{130} The legal profession has chosen to align itself with the ethical principles most common to the profession’s majority and decided not to make exceptions for those who might align themselves more

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\textsuperscript{128} I will admit that this would be a difficult choice for anyone to make. However, it is important to note the reason for the conflict here. A direct conflict between an individual’s professional standards and his or her religion is particularly vexing, perhaps because it is so clear cut, and so impossible to reconcile. This is what I mean to highlight.

\textsuperscript{129} It is also interesting to note that, given the clear Judeo-Christian majority in our profession, it is most likely that the disciplinary committee hearing the action against this Muslim lawyer would be mostly Judeo-Christian. This might make it more difficult for them to understand his dilemma, and therefore easier to find fault with his actions.

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naturally with alternative, or even conflicting, ethical traditions. It is important to heed the potentially alienating effects of this decision. If this is the decision the profession chooses to make, it should be done expressly and with a full understanding of the implications.\textsuperscript{131}

\textbf{V. CONCLUSION}

The ABA Model Rules of Professional Conduct are based on and reflect Judeo-Christian ethical principles, specifically those derived from the Bible. The fact that the ABA Model Rules are actually \textit{based} on biblical ethics and, in many cases, traceable directly to passages of the Bible, means that these Rules effectively \textit{are} religious edicts, which use Judeo-Christian words, reflect Judeo-Christian ethical principles, and attempt to elicit Judeo-Christian ethical behavior.

This Judeo-Christian bias and basis affect the legal profession in each of the three major stages of a lawyer’s professional life: law school, admission to the bar, and practicing law. In each of these three areas, the religious nature of the Rules has the potential to exclude and even harm those that do not ascribe to a Judeo-Christian ethical standard.\textsuperscript{132} The legal profession must choose to continue creating, using, and enforcing Rules that reflect the current religious and ethical majority – a decision that would perpetuate that majority – the profession can choose to take some small steps toward a dialogue that might slightly increase the minority. Outside social, economic, and educational factors will certainly affect diversity within the legal profession as much or more than even a complete overhaul of the ABA Model Rules of Professional Conduct. However, changing the profession’s internal policies might have a positive effect on external notions of who can be a lawyer.

\textsuperscript{131} \textit{See supra}, note 13.
\textsuperscript{132} However, it is not clear that relativism is either possible or desirable. What then is the alternative option? A conscious choice.
As a place to start, the legal profession could recognize the religious origins of the Model Rules and start an open, honest, and inclusive conversation about them while future lawyers are still in law school. As future self-regulators and re-creators of the Model Rules, law students are well placed to put fresh eyes onto the profession’s ethical system. Let them apply the critical, analytical, and adversarial tools they are given in other substantive classes to the ethical laws the profession creates for itself. Let them debate if they would like to perpetuate the Judeo-Christian ethical norms that are currently embedded in the history, language, and principles of the Model Rules.

Second, the legal profession should begin to research any potential bias that might be latent in the MPRE, which guards the door to the legal profession. Without research, like the statistics gathered and analyzed for the SAT, it will not be clear whether or not it would be best to add some alternative question structures, change language, or modify scoring on the MPRE in order to balance the scales. The legal profession should be equipped to analyze the potential for bias that its gatekeepers may hold. Then the profession can choose to take steps toward correcting that bias, opening the gate wider than their predecessors, or not.

Finally, the legal profession should become conscious of the potential for unequal discipline among practicing lawyers. It will not be possible to re-write the Model Rules overnight. It will never be possible to include all of the world’s various ethical traditions and interpretations. But perhaps the legal community could invite more of those with an alternative view to the ethical roundtable. Hearing alternative ethical interpretations in ABA Ethics Commission Meetings, on disciplinary panels, and in ethics opinions, would help avoid the automatic exclusion of those who do not automatically ascribe to Judeo-Christian ethical norms.
American lawyers practice all over the world today. They practice in Muslim or Jewish law-based countries, in countries with Buddhist or Hindu ethical norms, and in communist countries that disassociate from any religious influence. And yet, no matter where U.S. lawyers practice law, they are held to the ethical standards of the American jurisdictions that hold their bar licenses – based on the ABA Model Rules. Should these lawyers, practicing in diverse religious climates, be held to Judeo-Christian Biblical standards? Does the profession want all American lawyers, no matter where they practice, to conduct themselves according to Judeo-Christian biblical norms? These are just some of the new questions the American legal community must begin to ask itself. Whatever the answers, they should be made in full consciousness of the religious basis and biases of the current ABA Model Rules and the potential effects these religious rules can have.