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Growing Greener Grass: Looking from Legal Ethics to Business Ethics, and Back

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ARTICLE

GROWING GREENER GRASS: LOOKING FROM LEGAL ETHICS TO BUSINESS ETHICS, AND BACK

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It is, as a rule, far more important *how* men pursue their occupation than *what* the occupation is which they select.

- Louis D. Brandeis[1]

I say that a cultivated intellect, because it is a good in itself, brings with it a power and a grace to every work and occupation which it undertakes, and enables us to be more useful, and to a greater number.

- John Henry Newman[2]

I. INTRODUCTION

Business ethics and legal ethics have a great deal in common. In their modern form, they arose in the same historical context, the scandals of the mid-nineteen-seventies. Ethicists in business and law ask the same fundamental question: How can a good person be a good member of this occupation? In answering that question, ethicists in both fields borrow from the same extramural sources in the social sciences and humanities: economics, sociology, anthropology, and psychology on the one hand; history, philosophy, literature, and theology on the other. Though business ethicists and legal ethicists do not talk much with each other, they reach strikingly simi-

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1. Louis D. Brandeis, *The Opportunity in the Law*, in *Business–A Profession* 313, 313 (Small, Maynard & Co. 1914).

2. John, Cardinal Newman, *Knowledge Viewed in Relation to Professional Skill*, in John Henry Newman, *The Idea of a University* 108, 119 (Frank M. Turner ed., Yale U. Press 1996).

lar answers or, as I have argued elsewhere, strikingly parallel sets of answers.[3]

And yet, all that having been said, anyone who looks long enough at the two disciplines sees a distinct difference. From my perspective, looking from one field to the other, from legal ethics to business ethics, I have to say that the grass is greener over there. Business ethics explores a far wider range of extramural material, in far greater depth. This is most evident in the standard textbooks and the leading treatises in the two fields. In this essay, I try to figure out why the grass is greener on what is, for me, the other side. Beyond that, as my title implies, I try to suggest how we in legal ethics might improve our own field.

In legal ethics, particularly the legal ethics classroom, to quote Kermit the Frog, "It ain't easy being green," if by "green" you mean inclined to use extra-disciplinary materials to foster what Cardinal Newman called "a cultivated intellect."[4] Why would this be the case? My research suggests a paradoxical reason: We in legal ethics are embarrassed, in our efforts to borrow from other disciplines, by the riches in our own field. In legal ethics, the "law of lawyering" has grown at the expense of "the ethics of lawyering;" by contrast, in business ethics, no comparable "business of business" competes with "the ethics of business." In a myriad of complexly related ways—here crabgrass comes all too easily to mind—the very lushness of law has tended to choke out transplants from other fields into legal ethics.

On the other hand, business ethics, lacking any such luxuriance of intra-mural material, is free—or forced—to borrow from outside. This necessity has fostered an exceptionally inventive cross-pollination with disciplines outside business. Thus, in legal ethics, an over-abundance of legal material becomes an embarrassment of riches, even as the dearth of such intra-mural material in business ethics necessitates the virtue of cross-disciplinary borrowings. Part II unpacks these twin paradoxes, the intra-mural richness that makes legal ethics interdisciplinarily poor, and the intra-mural poverty that makes business ethics interdisciplinarily rich.

At the outset, however, we must address an even more paradoxical prospect, which I meant to conjure up in my title: The grass cannot literally always be greener on the other side of the fence, any more than all of the children of Lake Wobegon can really be above average (even in Minnesota). We in legal ethics are, after all, looking at your[5] field, even as you in

3. *See e.g.* Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 Iowa J. Corp. Law 469 (Spring 2004).

4. Newman, *supra* n. 2, at 119.

5. The choice of personal pronouns is important; it needs to be the second person, not the third. One of the great strengths of the University of St. Thomas symposium is that it has legal ethicists and business ethicists talking with one another, not just about one another (the latter of which is, itself, all too rare).

business ethics look at ours; it would be exceedingly odd if we all saw the other's grass as greener. The greater greenness would then have to lie, as the saying suggests, not in our neighbor's richer fields, but in our own envious eyes. I address that prospect at the outset.

The plan of my essay is tripartite—with my hosts' indulgence, I would say Trinitarian. Part I surveys our adjacent fields, legal ethics and business ethics, for objective evidence that the latter is truly the greener, the more enriched by interdisciplinary cross-fertilization. Part II diagnoses legal ethics' interdisciplinary deficiencies as the product of a paradox: an embarrassment of riches in the field of law itself. Finally, Part III prescribes two basic supplements to cure that deficiency: Justice Louis Brandeis's program for pursuing all professional callings, especially law and business, in what he called "the grand manner,"[6] and the Roman Catholic tradition of higher education, particularly as advanced by John Henry Cardinal Newman.

II. Surveying the Neighboring Fields

A. *The Greenness of Both Fields*

It must be said at the outset that both fields, legal ethics and business ethics, are wide and well-cultivated. Having covered this ground in an earlier study, let me report here my findings there.[7] Both legal ethics and business ethics are well-established academic disciplines. Both are firmly ensconced in the curricula of their respective occupation's professional schools, and both bulk large in undergraduate courses on professional ethics particularly and applied ethics generally.[8] Both have specialized professional journals,[9] textbooks,[10] and treatises,[11] and scholars in both disci-

6. Brandeis, *supra* n. 1, at 313.

7. Atkinson, *supra* n. 3, at 475-76.

8. *See Ethical Issues in Business: A Philosophical Approach* xi (Thomas Donaldson et al. eds., 7th ed., Prentice Hall 2002) ("Since [1979] the field of business ethics has grown into an academic discipline bristling with research and practical implications for managers."); Deborah L. Rhode & David Luban, *Legal Ethics* xiv (3d ed., Found. Press 2001) ("Since the 1970s, the law of lawyering has developed at an explosive rate; empirical research has expanded at a corresponding speed; and the philosophical underpinnings of professional roles have attracted more searching examination.").

9. In law: Georgetown Journal of Legal Ethics; Journal of the Institute for the Study of Legal Ethics; Journal of the Legal Profession; Notre Dame Journal of Law Ethics & Public Policy. In business: Journal of Business Ethics; Business Ethics Quarterly; Business and Professional Ethics Journal; Business Ethics; Perspectives on the Professions.

10. For a sampling of legal ethics texts, see *infra* n. 26. As to introductory business ethics texts, one such book reported that upon publication of its first edition only three such texts existed, whereas today they number more than fifty. *Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8, at xi. For a partial list, with brief annotations, *see* Patricia Ann Bick, *Business Ethics and Responsibility: An Information Sourcebook* 3-7 (Oryx Press 1988).

11. *See e.g.* Norman E. Bowie, *Business Ethics: A Kantian Perspective* (Blackwell Publishers 1999) (business ethics); Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* (3d ed., Aspen Publishers 2004) (legal ethics); Charles W. Wolfram, *Modern Legal Ethics* (West Publg. 1986) (legal ethics).

plines publish articles in the more general academic literature of their field, i.e., general issue law reviews[12] and business journals.[13] Both sides have continued to address the same issues, often arising in the same court cases and factual settings.[14] The rich scholarly literature in both legal ethics and business ethics is frequently interdisciplinary.[15] The most obvious and frequent borrowings on both sides are from economics,[16] moral philosophy,[17] and religion;[18] but other fruitful cross-pollination comes from sociology,[19] anthropology,[20] and psychology.[21]

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12. *See e.g.* David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 Md. L. Rev. 424 (Winter 1990); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545 (1995); Deborah L. Rhode, *Ethical Perspectives and Legal Practice*, 37 Stan. L. Rev. 589 (1985); William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083 (1988).

13. *See e.g.* Raymond C. Baumhart, *How Ethical Are Businessmen?*, 39 Harv. Bus. Rev. 6 (July/Aug. 1961); Thomas J. Donaldson, *What Justice Demands*, 40 Rev. of Soc. Econ. 301-10 (Dec. 1982); Douglas S. Sherwin, *The Ethical Roots of the Business System*, 61 Harv. Bus. Rev. 83-92 (Nov./Dec. 1983); Clarence C. Walton, *The Connected Vessels: Economics, Ethics, and Society*, 40 Rev. of Soc. Econ. 251-90 (Dec. 1982).

14. The Ford Pinto case, for example, is a perennial favorite on both sides of the fence. *See e.g.* David Luban, *Lawyers & Justice: An Ethical Study*, in Rhode & Luban, *supra* n. 8, at 327-331 (discussing application on the law side); William H. Shaw, *Business Ethics* 75 (4th ed., Wadsworth Publg. Co. 2002) (discussing application to the business side). And, of course, the Enron debacle will surely have equally great, and dual, appeal. *See e.g.* Nancy B. Rapoport & Bala G. Dharan, *Enron: Corporate FIASCOS and Legal Implications* (Found. Press 2004); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 Stan. J.L. Bus. & Fin. 9 (2002).

15. Shaw, *supra* n. 14, at xi ("Business ethics has an interdisciplinary character.").

16. *See e.g.* LaRue Tone Hosmer, *The Ethics of Management* (3d ed., Irwin 1996) (devoting Chapter 2 to managerial ethics and microeconomic theory); Karl Marx, *Alienated Labour*, in *Ethical Issues in Business: A Philosophical Approach supra* n. 8, at 159; Adam Smith, *Benefits of the Profit Motive*, in *Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8, at 155.

17. *See e.g. Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8; William A. Evans, *Management Ethics: An Intercultural Perspective* 57-85 (Martinus Nijhoff 1981) (discussing philosophical and moral thought and its influence on business ethics); Sherwin Klein, *Ethical Business Leadership: Balancing Theory and Practice* 7-18 (Peter Lang 2002) (discussing the issue of ethical business leadership); Hugh Willmott, *Towards a New Ethics? The Contributions of Poststructuralism and Posthumanism*, in *Ethics and Organizations* 76-114 (Martin Parker ed., Sage Publications 1998) (discussing moral philosophy).

18. *See e.g.* Paul Camenisch & Dennis McCann, *Christian Religious Traditions*, in *Enriching Business Ethics* 63-81 (Clarence C. Walton ed., Plenum Press 1990); James M. Childs, Jr., *Ethics in Business: Faith at Work* (Fortress Press 1995); Evans, *supra* n. 17, at 41-50 (discussing religious influences on modern ethical behavior in Western business); Alexander Hill, *Just Business: Christian Ethics for the Marketplace* (Intervarsity Press 1997); Rabbi Gordon Tucker, *Jewish Ethical Perspectives Toward Business*, in *Enriching Business Ethics*, *supra* at 43-61.

19. *See e.g.* Richard L. Abel, *American Lawyers* (Oxford U. Press 1989); John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Russell Sage Found. 1982); Edward J. Imwinkelried, *A Sociological Approach to Legal Ethics*, 30 Am. U. L. Rev. 349 (1980); Kenneth Mann, *Defending White Collar Crime: A Portrait of Attorneys at Work* (Yale U. Press 1985).

20. Robert Jackall, *Moral Mazes: The World of Corporate Managers* (Oxford U. Press 1988). Jackall's work is widely used in legal ethics. *See e.g.* Rhode & Luban, *supra* n. 8, at 347-55. It is also widely used in business ethics. *See e.g. Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8, at 284-301.

B. *The Greater Greenness of Business Ethics*

Yet that very survey left me with an unmistakable impression, which I have tried to follow up in this study: Business ethics seems to be, in significant ways, much more richly interdisciplinary. This greater greenness lies, I have found, more in teaching materials than in scholarly writings. And this greater greenness in the materials taught has an interesting parallel in the teachers themselves: Business ethicists are much more likely than legal ethicists to have advanced degrees in disciplines outside their department.

i. Scholarship

I could hardly notice this difference, of course, until I had occasion to look up from my work in legal ethics and over to others' work in business ethics. But that, I think, was not the whole story. I had long missed this in my own field, I think, because of the particular corners I tend to cultivate in my scholarly writing, and hence reading: the philosophical foundations of legal ethics and the insights that legal ethics can find in literary classics. These are, I now realize, particularly "green" areas of my own field. Having now studied the philosophical foundations of business ethics, I have found–though I admittedly can make the case only impressionistically–that the leading scholars in that subfield of legal ethics are as richly and competently interdisciplinary as their counterparts in business ethics. Beyond that, the field of law and literature, which overlaps the field of legal ethics, seems to have only a much smaller and less well-developed counterpart in business scholarship generally and business ethics in particular.

I rather suspect—though I have not tried to substantiate this impression—that what is true qualitatively may not be true quantitatively. Even though legal ethics scholars who focus on the philosophical foundations of their field may be as "green" as their counterparts in business ethics, quite possibly there are fewer of the former than the latter, relative to the number of scholars in the fields as a whole. A smaller proportion of legal ethics scholars, that is, may be exploring the philosophical side of their field.

ii. Teaching Materials

What was true of my scholarship was also true of my teaching. Reflecting my own interests—shamelessly, no doubt—I chose for my teaching the "greenest" of the available casebooks, as soon as it became available: Deborah Rhode and David Luban's *Legal Ethics*, the first edition of which appeared in 1993.[22] In retrospect, my experience with that text as a teaching vehicle may have been the seed of my hypothesis for why legal ethics is

21. *See e.g.* Edwin Hartman, *Organizational Ethics & the Good Life* (Oxford U. Press 1996); *Codes of Conduct: Behavioral Research into Business Ethics* (David M. Messick & Ann E. Tenbrunsel eds., Russell Sage Found. 1996).

22. Deborah Rhode & David Luban, *Legal Ethics* (1st ed., Found. Press 1992).

less green than business ethics. Although I found its rich extramural borrowings a great boon, my students showed considerable resistance. (And there is at least some evidence that other legal ethics teachers have had similar experiences.)[23]

We will explore that hypothesis in the next section. Here I need to set out the evidence that business ethics texts are much "greener" than legal ethics texts. Our first task was to choose the texts to include in our database, then to choose our measure of "greenness," and, finally, to apply that measure to the database.

1. Selecting the Texts for Inclusion in the Database

Ideally, we would have included in our database all the currently available texts in both fields. Daunted by the magnitude of that task, we narrowed our scope. As a more manageable second-best, we would have liked to examine two sets of texts in each field: those most widely assigned, and those assigned at the twenty most elite schools. Unfortunately, the former set proved impossible to identify; publishers generally refused to reveal numbers of texts sold. We were left, then, with the second half of our second-best field: the casebooks assigned in courses at the twenty "top" schools. As our measure of "top-twenty" status, we used the U.S. News and World Report Rankings.[24] For all its flaws, this ranking has several things to commend it: It ranks business and law schools by comparable criteria, which include both objective and reputational factors, and the ranking is widely watched, inside academia and out.

To determine which texts were assigned at which schools, we first identified the ethics teachers at those schools who taught the course in the academic year 2003-2004, then checked their posted syllabi or, in their absence, contacted the teachers themselves.

2. Measuring "Greenness"

As criteria of the casebooks' "greenness," we used several sets of proxies: references to extramural fields, citations to classic writers in other disciplines, and employment of key concepts from those disciplines. The particular proxies in each of the three sets are listed in Table 1.

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23. My survey of US News "top twenty" law schools, discussed below, indicates that *Legal Ethics* is used at only one, and that one is Prof. Rhode's Stanford. *See 2nd Front: Best Graduate Schools 2004; Law*, 134 U.S. News & World Report 70 (Apr. 14, 2003).

24. *Id.*

TABLE 1[25]

	Law Texts[26]					Business Texts[27]	
	H, K, & C	K & W	G	Z & L	R & L	D & W	B & B
Number of professors using:	12	5	4	3	4	4	1
Proxies[28]							
People	23	1	0	0	9	41	16
Average per text	**6.6**					**28.5**	
Disciplines	44	2	0	0	17	11	0
Average per text	**12.6**					**5.5**	
Concepts	0	1	0	0	10	25	21
Average per text	**2.2**					**23**	

On-line, full-text searches are unfortunately not readily available for casebooks in either field, and "cover-to-cover" reading of the entire texts was not feasible. As an alternative, we looked for the proxies in each book's index, table of contents, and bibliography. Our method undoubtedly results in some undercounting of the actual appearance of our proxies in the texts. On the other hand, this method has the offsetting advantage of reflecting the authors' own references to the proxies, which itself may be a measure of the importance they attach to them. Think of it this way: If you put Plato in your book, but make it hard for your reader to find him, isn't it reasonable to infer that you thought his inclusion less important?

As you can see, with respect to two of the three sets of proxies, business ethics texts were substantially greener. On average, they referred to significant figures in other disciplines 28.5 times to legal ethics' 6.6, and to

25. Texts for this table were selected based upon a survey of tenured and tenured-track professors at the top twenty law and business schools (as reported by US News and World Report). Professors were asked to identify the texts they used in their ethics courses during the 2003-2004 academic year. Only textbooks were considered in the study. On the law side, the table shows only those textbooks used by more than one professor. On the business side, the table shows all the textbooks identified in the survey. Of the six professors who did not use textbooks, five used their own materials.

26. Law texts are abbreviated as follows. H, K, & C: Geoffrey C. Hazard, Jr., Susan P. Koniak & Roger C. Cramton, *The Law and Ethics of Lawyering* (3d ed., Found. Press. 1999); K & W: Andrew L. Kaufman & David B. Wilkins, *Problems in Professional Responsibility for a Changing Profession* (4th ed., Carolina Academic Press 2002); G: Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (6th ed., Aspen Publishers 2002); Z & L: Richard A. Zitrin & Carol M. Langford, *Legal Ethics in the Practice of Law* (2d ed., Matthew Bender 2002); R & L: Deborah L. Rhode & David Luban, *Legal Ethics* (2d ed., Found. Press 1995).

27. D & W: Thomas Donaldson & Patricia H. Werhane, *Ethical Issues in Business: A Philosophical Approach* (6th ed., Prentice Hall 1999); B & B: *Ethical Theory and Business* (Tom L. Beauchamp & Norman E. Bowie eds., 5th ed., Prentice Hall 1997).

28. We used the following proxies: People: Aquinas, Aristotle, Freud, Gilligan, Kant, Kohlberg, Marx, Mill, Parsons, Plato, Rawls, Weber, Cicero, Socrates, Hegel, Bentham, Dostoevsky, MacIntyre, Locke, Smith, Hume; Disciplines: anthropology, economics, moral philosophy, philosophy, psychology, sociology, theology; Concepts: deontology, metaethics, teleology, relativism, consequentialism, utilitarianism, virtue ethics, pluralism, human nature ethics, egoism, contractarianism.

significant inter- or extra-disciplinary concepts 23 times to 2.2. Legal ethics texts averaged more references to other disciplines, 12.6 times to business ethics' 5.5, but the balance shifts substantially in the other direction with the removal of a single outlier.[29]

iii. The Professors

Our findings about the greater greenness of teaching materials in business ethics had a striking parallel in our findings about the teachers in the two fields. Here we took as our database the ethics professors at the U.S. News top-twenty law schools and business schools. Our proxy for "greenness" here was post-graduate degrees.[30] Our findings, tabulated in Table 2, are striking. Business ethicists in business schools come from a wide range of disciplines outside the schools in which they hold their primary posts; legal ethicists in law schools, by contrast, tend to have been educated in law. What is more, business ethicists in business schools tend to hold advanced academic degrees, PhDs or the equivalent. Legal ethicists, like legal scholars generally, tend to hold only the professional juris doctoral degree.

Our findings are tabulated in Table 2.

29. The outlier is Hazard, Koniak, & Cramton; that aside, the law casebook average is 4.75 to business' 5.5.

30. A far more promising approach would have been to apply our casebook proxies for greenness to the professor's writings. This approach has been fairly well refined in legal scholarship itself. *See* Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. Leg. Stud. 517 (2000); *cf.* David H. Kaye & Ira Mark Ellman, *The Pitfalls of Empirical Research: Studying Faculty Publication Studies*, 36 J. Legal Educ. 24 (1986). It poses several serious problems, however, for our interdisciplinary comparisons. One problem is that legal scholars tend to annotate far more fully–some would say fulsomely. A predictable result would be substantial over-counting of proxies for greenness in legal ethics articles. Another problem is that full-text searches are substantially more advanced and reliable in legal scholarship, perhaps driven by the wider use of legal scholarship by practicing lawyers. Here a predictable result would be substantial under-counting of proxies for greenness in business ethics.

TABLE 2[31]

Degree	Law School Faculty	Business School Faculty
JD/LLB	38	5
LLM	5	
JSD	2	
PhD	6	20
ThD	1	
Mdiv		1
DBA		1
MBA		1
MA or AM	7	11
Total degrees	**59**	**39**
Total professors	**38**	**22**
Percentage of professors with doctoral degrees (JSD, PhD, ThD, and DBA)	**24%**	**86%**
Percentage of schools in top 20 reporting (of the 15 business schools reporting, 4 had either no specific ethics course or no tenured or tenured-track faculty teaching ethics)	**90%**	**75%**

Post graduate degrees earned is admittedly a rather crude proxy for scholarly greenness. Yet, as we have seen, the differences are quite dramatic. And, as we shall see in the next part, it may well be both a cause and an effect of differential greenness elsewhere.

C. *Summary*

With apologies for pandering to my hosts' home turf (not to mention over-taxing my titular metaphor), let me sum up the differences this way: The field of legal ethics tends to give law students the monocultural monotony of a Wisconsin cow pasture; just over the fence, business ethics offers their counterparts in MBA programs the multidisciplinary diversity of a Minnesota prairie meadow.

There is a striking irony here. Law has long considered itself a learned profession, not a mere trade or business. And yet, as measured by what students are actually taught about ethics, business students' instruction seems much broader and deeper. In terms of integrating the insights of other disciplines into materials aimed at prospective and present practition-

31. This chart represents data reported by the top-twenty law and business schools (as measured by U.S. News & World Report, *supra* n. 23), in response to queries requesting the names and degrees of tenured or tenured-track professors who taught ethics courses during the 2003-2004 academic year.

ers, it is law school that is more of a trade school and less of a graduate school than business school.

Having identified these rather striking disparities, how can we account for them? That is our task in Part II. A curious turn in our research suggested our hypothesis. In comparing the interdisciplinary borrowings in the two fields' teaching texts, I suggested to my research assistant that we would want to account in each field for what was extramural. Thus, I explained, in legal ethics texts, we would ideally identify everything that was not law. When I attempted to suggest the parallel process of elimination in business ethics, however, I found myself at a loss. If you take out all the non-legal stuff in legal ethics, what you have left is law; if you take out all the non-business material in business ethics, there seems to be nothing left at all. Picture the paring of fruit. Legal ethics slices like a peach or plum, with a large, hard pit at its center; business ethics cuts more like a banana. It has no stone at its center; indeed, its shape is not a sphere, but a parabola, with its true center outside itself.

III. The Diagnosis: Why It Ain't Easy Being Green (in Law School)

Thomas Shaffer long ago gave what now strikes me as the most accurate diagnosis: "Most of what American lawyers and law teachers call legal ethics is not ethics. Most of what is called legal ethics is similar to rules made by administrative agencies."[32] This Part unpacks that diagnosis by comparison with business ethics as a sort of cross-disciplinary control. We first examine the fundamental problem: In legal ethics, the law drives out the ethics, along with pretty much everything else. Then we will examine several ancillary factors, each of which flows from, or contributes to, this embarrassment of riches.

A. *The Dual Paradoxes: Legal Ethics' Embarrassment of Intramural Riches; Business Ethics' Necessity of Extramural Borrowing*

i. The Parallel Structure of Occupational Ethics

As we said at the outset, business ethics and legal ethics share with other occupational ethics a basic question: How can a good person be a good practitioner of this occupation? Their answers to that basic question follow a common structure, that of role morality. The "good" as to both persons and practitioners must ultimately derive from shared social norms and values. This derivation typically takes four steps,[33] from a common

32. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963, 963 (1987).

33. The legal ethicist David Luban, following Schopenhauer, calls this "the fourfold root of sufficient reason." David Luban, *Lawyers and Justice* 132 (Princeton U. Press 1988). That said, I should also point out that Luban and I do not quite count the same four steps. I add "ethics

denominator of shared norms, down through basic social systems and the occupational roles they require, to the rules that those occupations imply and the acts those rules specify.[34] To understand why basic legal ethics and business ethics texts cover this ground so differently, we must first mark off that ground in some detail.

1. *"Ethics Proper": The Right and the Good; Truth, Justice, and the (American) Way*

The highest, or most abstract, level of analysis focuses on shared or sharable, if not universal, norms and values: the right and the good. This, of course, is the work of substantive moral and political philosophy, the search for personal virtue and political justice. At the top of this uppermost tier sits (or floats) metaethics, the study of the metaphysical and epistemological status of those "shared" norms and values.[35]

2. *Essential Social Institutions: The Ethical Analysis of Law and Business*

As Michael Novak pointed out in his keynote address, our society has three basic social systems: law, business, and culture; our polity, our economy, and our civil society.[36] The second level of analysis in occupational ethics seeks to justify our legal and business systems in terms of more fundamental norms and values: truth, justice, welfare, autonomy, and happiness. It is the job of legal ethics and business ethics at this level of analysis to tie their respective systems to the highest shared values of our society.

In each field this analysis occurs at two levels: the general and the specific, or the wholesale and the retail.[37] The highest, or wholesale, level is that of aggregate or systemic analysis. In business, the issue is the moral justification for capitalism and the market, and the answer is, "provide the

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proper" at the top, where it is only implicit in Luban's scheme, and I conflate his lower two steps, occupational rules and the individual acts they require, into one under the heading of the former.

34. The lower three of these four analytic levels correspond exactly to the three panels into which this program's papers were divided–further evidence of the wide acceptance of this mode of analysis. For explicit parallels in professional ethics generally, see Michael Bayles, *Professional Ethics* 17-28 (2d ed., Wadsworth Publg. 1989) and Alan H. Goldman, *The Moral Foundations of Professional Ethics* 6-7 (Rowman & Littlefield 1980); for explicit parallels in business ethics, see Jack N. Behrman, *Essays on Ethics in Business and the Professions* viii (Prentice Hall 1988) and Kenneth E. Goodpastor, *Ethics in Management* 2 (Harvard Bus. Sch. 1984).

35. Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 Md. L. Rev. 854 (1992) ("A Metaethical Interlude").

36. Michael Novak, Speech, *Key Note* (U. St. Thomas Sch. L., Minneapolis, Minn., Mar. 6, 2004) (copy on file with the *University of St. Thomas Law Journal*).

37. *See* Norman E. Bowie & Ronald F. Duska, *Business Ethics* 45 (2d ed., Prentice Hall 1990) ("We also distinguish between the entire economic system and institution of business on the one hand, and the specific practices and activities that go on within business, such as buying, selling, marketing, hiring, firing, advertising, auditing, managing, making contracts, and such, on the other hand.").

maximum quantity and quality of goods at the lowest cost," or, both more briefly and more technically, "produce efficiently." The corresponding question for legal ethics is the moral justification of liberal democracy, how the legal system as a whole measures up under ethical analysis. The classical answer is "promote justice."

The lower, or retail, aspect of systemic analysis in both fields raises a host of subsidiary questions about implementing those fundamental imperatives: "produce efficiently" and "promote justice." Thus, in business ethics, this level of analysis questions the normative foundations of particular aspects of capitalism, for example, environmental issues, employee relations, obligations to host communities, and impacts of globalization. The answers, of course, are exceptionally complex and detailed–and debatable. In law, the corresponding subsidiary questions analyze the justice of particular laws in particular substantive fields–tax law, contracts, and labor law, for example—and in particular legal processes—legislation, administration, and adjudication. The answers, again, are various and complex.

3. *Occupational Roles, or the Ethics of Being a Lawyer or Businessperson*

Once we see these ramifications of systemic analysis, especially at the lower, retail level, we see why, as a functional matter, each system, the law and the market, requires "operatives" or "functionaries," those who carry out occupationally specific roles. These are, respectively, lawyers and business managers. Without their assistance, laypeople would be virtually lost in the complexities of business and the law, less able to secure profits in the market and justice before the law.[38] As a normative matter, the specialized roles of lawyer and business manager must be justified in terms of advancing the goals of the systems themselves.

As a functional matter, both business managers and lawyers advance systemic ends by acting on behalf of others. Each of their specialized roles, in other words, has an inherent agency aspect. This agency element is clearest in the case of lawyers. Lawyers stereotypically deliver legal services to others; indeed, it is proverbial that "the lawyer who represents himself has a fool for a client." With respect to business managers, the agency aspect is less obvious, but no less fundamental. Many business managers are certainly the agents of the owners of the enterprise, but some managers are the owners themselves. Yet even where managers are entrepreneurs, they are almost never the sole owners of all the firm's assets. Virtually all major for-profit firms have public investors—or plan to. And even the smallest sole proprietorship almost necessarily involves "outsiders" in one

38. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer*, 85 Yale L.J. 1060, 1076 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 Am. B. Found. Research J. 613, 617 (1986).

form or another. Mom and Pop operations will certainly have material suppliers, if not employees; if they are to expand, they will probably approach the local bank, if not public capital markets. (And, of course, there are always potential conflicts between Mom and Pop, neither of whom is going to live forever).

Thus, both roles, lawyer and business manager, are structurally tripartite. Functionally first—literally "principals"—are lawyers' clients and businessfolks' investors. The lawyers and businessfolk themselves, as agents, are second—again, functionally and literally. And the work of these agents for their clients necessarily involves third parties, including the public and non-investor stakeholders in business enterprises, for example, employees.

4. Occupational Norms or Rules

The roles of lawyer and business manager entail role-specific occupational norms or rules. In their justification and structure, these rules parallel the roles that they constitute. Their justification is derivative, anchored in the advancement of systemic values; their structure is tripartite, reflecting that members of the occupations are agents acting on behalf of principles in dealing with third parties.

Most interesting, for our purposes, are two other common features. First, each field imports a basic norm from the other, business from law and law from business. This reflects, again, the equiprimordiality of our society's twin public institutions, the market and the law. Second, each field has a set of parallel minimum requirements that are almost universally agreed upon and a parallel set of optimal requirements that are hotly contested.

Here we can consider only the most basic norms, from which others are derived. Fortunately, the basic norms in the two fields are quite closely analogous to each other. Unfortunately, the structure of these norms in both fields is a bit complex, and in this complexity lies the key to our problem.

The structure of occupational rules is essentially three tiers of pairs. In the first tier, occupational rules divide into the minimal and optimal. Minimal rules are those without which the system of law and business cannot operate at all; optimal rules are those that make the systems work best. Each of these sets, (a) the minimal and (b) the optimal, has a pair of subsets, (i) the positive and (ii) the negative; these "do's" and "don'ts" are the second tier of occupational rules. In the third tier, these positive and negative rules subdivide into (1) primary rules and (2) secondary rules; the first have to do with the agent's duty to the principal; the second with the agent's duty to him- or herself. In this section we consider first (a) minimal norms, with their (i) affirmative and (ii) negative requirements of (1) agents toward prin-

cipals and (2) agents toward themselves. We then consider, in less detail, (b) optimal rules, with their parallel subsets.

a. Minimal Requirements

All scholars in law and business agree that there are certain irreducible minimum requirements of business managers and lawyers. These requirements form the essential foundations of the systems of law and business. Here they are, in barest outline:

i. Affirmative Duties

The primary minimal affirmative duty of lawyers and business managers is virtually definitional: Advance client ends through the application of expert knowledge.[39] As we have seen, the occupational roles themselves are required by the inevitable complexity of our legal and economic systems. The most basic duty of those who occupy these roles must, accordingly, be to help their principals through the systems.[40] On the business side, this imperative is narrowest: Help your principal make a profit. On the legal side, it is broader. Lawyers help their clients not only make money, but also spend it, even give it away; in addition, lawyers advise clients in matters beyond getting and spending altogether, matters like criminal defense, for example. But in both fields, law and business, the first and great commandment is essentially this: Help your client.

The second commandment is surprisingly like unto it: Help yourself. The secondary minimal affirmative duty of both lawyers and business managers is to earn enough at their occupation to support themselves. In our essentially market-oriented system for providing expert assistance to private citizens, the operative norm is "muzzle not the ox that treadeth out the corn; the laborer is worthy of his reward."[41]

ii. Negative Duties

The minimal negative duties of both lawyers and business managers are legal constraints on their minimal affirmative duties. The essence of these negative duties is to not violate the law in performing your affirmative duties. First, then, in advancing your principal's interests, don't transgress the legal entitlements of particular third parties or the general public. The rules in this category limit what agents, lawyers, and managers can do for

39. *See* Bowie & Duska, *supra* n. 37, at 7 ("The professional's function is to meet the needs of the principal.").

40. These are what Kant calls "rules of skill," or hypothetical imperatives: If you want to accomplish end A, you must employ means B. Immanuel Kant, *Foundations of the Metaphysics of Morals* 36-46 (Robert P. Wolff ed., Lewis W. Beck trans., The Bobbs-Merril Co., Inc. 1969).

41. 1 Corinthians 9:9 (King James); 1 Timothy 5:18 (King James), both citing Deuteronomy 25:4 (King James); *see also* Matthew 10:10 (King James) (laborers deserve their wages); Luke 10:7 (King James) (same).

their principals, to others.[42] Second, similarly, in advancing your own interest as agent, don't violate your principal's legal entitlements.[43] Here the relevant laws limit what agents can do *to* principals, as opposed to *for* them.

iii. Summary

Virtually everyone, inside the academy and out, on both the legal and the business sides, agrees on this set of minimal requirements. Reduced to their essence, they come down to this: Use your expert systemic knowledge to advance your principal's interest and your own, within the law.

b. Optimal Requirements

Matters could not stand much more differently with respect to the optimal, as opposed to minimal, requirements of business ethics and legal ethics. Here scholars and practitioners in both fields dispute, not just what the requirements are, but whether there are any such requirements at all. The basic difference of opinion, in both law and business, is this: In performing their role-related functions, should business managers and lawyers consider any norms other than what we have called the occupational minimum?[44] In both cases, as we have seen, this minimum is to advance their principals' interests without violating relevant law. The optimum, by contrast, would essentially be this: Affirmatively, do more good than the market demands to your principal, yourself, and others; negatively, do less harm than the law allows, again, to your principal, yourself, and others.

Beyond these basics, the optimal rules could quite conceivably overlie or supplement the minimal rules at every point. For the minimal primary and secondary norms, there would be an optimal norm; for the minimal negative corollary of these norms, there would be an optimal corollary. The elaboration of these optimal norms, primary and secondary, affirmative and negative, would be the work of legal ethics and business ethics in the narrow sense, what we might call legal ethics and business ethics "proper."

There is, indeed, a substantial element of "occupational ethics proper" in both fields. But there is a great deal more "business ethics proper" in business ethics than there is "legal ethics proper" in legal ethics. And what

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42. Much of the law governing principals, as opposed to agents, is incorporated here through the general rule that principals cannot do through agents what they the principals cannot do themselves. "The appointment of an agent to do an act is illegal if an agreement to do such an act or the doing of the act itself would be criminal, tortuous, or otherwise opposed to public policy." *Restatement (Second) of Agency* § 19 (1958). Consequently, "[i]f the one directed to perform the act does the act directed, the person directing him may be responsible criminally and, if a tort is committed, civilly." *Id.* at § 19 cmt. a.

43. *See* Ted Schneyer, *Moral Philosophy's Standard Misconceptions of Legal Ethics*, 1984 Wis. L. Rev. 1529 (1984) (arguing that many moral philosophers critical of legal ethics overlook the fact that much of the law governing lawyers attempts to protect clients from their own lawyers).

44. Atkinson, *supra* n. 3, at 484-510.

holds true at this level of analysis also holds true at the others, as we shall see in the next section.

5. *Divergent Treatments of the Four Phases*

Legal ethics and business ethics deal very differently with the four phases of normative analysis outlined in the prior section. Having noted the parallel structure of business ethics and legal ethics, we need to focus now on their very different treatments of those phases. For purposes of this analysis, we will work from the bottom up, beginning where the prior section ended, with the rules that constitute the occupational roles of lawyer and businessperson. From that perspective we can best see that the difference between legal ethics and business ethics has much to do with the fact that law and the market function very differently as normative systems. In particular, we will see how this affects two related phenomena: the extent to which ethicists in the two fields borrow from other fields, and the extent to which ground that might be covered by ethicists in each field is taken by others in their own field.

a. Occupational Rules

In analyzing the core occupational rules of law and business, we identified two tiers of complementary pairs: minimal rules and optimal rules, each with affirmative and negative subrules, each, in turn, with primary and secondary rules. Here we need to note a striking asymmetry between the legal and the market sides of minimal rules, an asymmetry with tremendous impact on legal ethics and business ethics as taught in graduate schools. As we shall see, it is this asymmetry that accounts for the crowding out of optimal rules by minimal rules in the teaching of legal ethics in law school.

i. Minimal Affirmative Rules

The primary minimal affirmative obligation of both lawyers and business managers is to advance client ends through the application of expert knowledge. In law, this largely involves knowing the legal system's structuring and enabling rules. For business clients in particular, this entails knowledge of the relative advantages of various legal entities, the forms of holding and transferring property interests, and the tax consequences of various structures and transactions. This is most of the law school curriculum. This material enters legal ethics proper only indirectly and minimally, in the form of the basic requirement of giving competent representation. In business, similarly, this is, presumably, pretty much the whole rest of the curriculum: How to make your client money. The standard divisions of business school–marketing, managing, and finance—all focus, more or less directly,

on maximizing profit.[45] By contrast, the secondary minimal requirement, sustain yourself, bulks relatively small in both law school and business school, not only in legal ethics and business ethics, but also in the rest of the law and business curriculum.[46]

To summarize, then, with respect to their coverage of affirmative minimal duties, law school and business school do not differ much. Both cover the primary duty, advance client ends, through the balance of their curricula outside their ethics courses; neither covers the secondary duty, support yourself, to any great extent in either their ethics courses or their other offerings.

ii. Minimal Negative Rules

This similarity of coverage does not extend, however, to minimal negative duties. This is where legal ethics, as compared to business ethics, is embarrassed by its riches. The basic prohibitions, as we have seen, are the same in both fields: Do not violate the law in performing your affirmative duties, i.e., in advancing either your principals' interest or your own. But the basic mandate is, in its very terms, a legal mandate. There is, predictably, much more coverage of this mandate in law school than in business school.[47]

If legal ethics were to take this negative mandate at its broadest, it would expand its purview to include much of the rest of the law school curriculum. The opening end of this wedge is the general maxim that agents—in this case lawyers—cannot do for their principals what the law forbids principals to do for themselves. What the law forbids principals to do, of course, is covered by various specific bodies of law, taught in various courses in the law school curriculum: taxation and environmental law, for example. A client who is forbidden to take a certain deduction or to emit a certain effluent cannot avoid those prohibitions by delegating the illegal task to an agent, lawyer or otherwise.

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45. To be sure, the actual process of making a profit may require a great deal of borrowing from other disciplines: sociology, psychology, even engineering and hard sciences. These cross-disciplinary borrowings would indeed be made by scholars in business schools; the point here is that they would not themselves require a separate field of business ethics. Similarly, the profitability of being "ethical" by some standard supplemental to profitability—e.g., "green," meritocratic, diverse—has so far been successfully subsumed under marketing, public relations, or industrial psychology/human relations. This, too, creates no need for business ethics as a separate discipline.

46. This is particularly true in law. "Law office management" and analogous courses are almost never offered at elite or aspiring law schools; indeed, such topics are treated rather contemptuously in legal academia generally.

47. In business schools, it is, rather, more typically "spun off" into "Business Law," which, perhaps tellingly, is most typically an undergraduate course, especially "for them." MBAs, presumably, delegate legal compliance to lawyers as a matter of greater specialization. Business ethics texts typically note that what is legal is not necessarily ethical, then take up in detail only the latter.

Clients often seek the aid of lawyers, on the other hand, not because they themselves are forbidden to undertake certain actions, but either because they themselves are unable to perform them or because the law mandates that they be done only by lawyers. Thus, for example, clients need lawyers, to litigate their cases, to draft complex legal documents, to certify the legal consequences of their actions, and most generally, to advise them on the legal consequences of their actions. The law, of course, constrains what lawyers as agents can do for their principals in these matters, particularly at the expense of others. Much of this law could logically be covered in process-oriented courses, especially civil procedure, and skills-oriented courses like trial and appellate advocacy. But much of it tends to be left to the legal ethics course.

Even more typically reserved to legal ethics is a second body of law, that which limits, not what lawyers can do for their clients, at the expense of others, but what laywers can do to their clients' detriment. This body of law, the fiduciary duties of lawyers to their clients, covers such matters as conflicts of interest, fee arrangements, and confidentiality of client information. By logical extension, it covers relations with prospective clients, the areas of advertising and solicitation.

These two bodies of law—the limitations on what lawyers can do for their clients and to them—together constitute the main body of a burgeoning field now called "the law governing lawyers."[48] This body of law bulks very large in legal ethics courses; it is, indeed, the mother lode of legal ethics' "embarrassment of riches." It is, as we shall see in the next section, the law that tends to crowd out the ethics in legal ethics.

iii. Optimal Rules

Optimal rules, remember, are the agent's duties, if any, above and beyond the legal and market minimums. They rest on criteria, other than mere profitability and legality, that business managers and lawyers ought to apply. These optimal rules would require, on the one hand, do less harm, and on the other, do more good, than the law or the market demand.

In legal ethics, particularly legal ethics texts and coursebooks, these optimal requirements are largely crowded out by the legal minima. This is implicit in the very titles of the texts. Legal ethics casebooks are seldom entitled "Legal Ethics;" more typical titles are "Professional Responsibility," "The Legal Profession," and "The Regulation of Lawyers."

Some legal ethicists minimize this element quite explicitly. Indeed, some legal ethicists are proud to accept Shaffer's analysis, if only to turn it on its head. With him, they are at considerable pains to assert that legal ethics is predominantly law, not ethics; against him, they argue that this is as it should be, a good thing rather than a bad one. There are two basic

48. *Restatement of the Law Governing Lawyers* (1998).

approaches to this law-over-ethics position. The first is to focus on the minimal norms, the letter of the law. The purpose here is to show that what governs the professional conduct of lawyers is "real" law, not just subjective musings and personal preferences.[49] The second approach, by contrast, heartily affirms the importance of optimal norms in the study of legal ethics. But it also insists on deriving these optimal norms from the law itself, not from extra-legal sources like moral philosophy.[50] The purpose for this internal focus is, again, quite explicit: to avoid the embarrassing softness of extra-legal, "merely" moral standards.[51] Like the first approach, this second aims to make legal ethics rich in the hard currency of law, not the "soft" currency of moral philosophy.

In business ethics, by contrast, supplementary or optimal norms bulk quite large. A great deal of business ethics focuses on precisely this issue: What norms, beyond the minima of obeying the law and making a profit, govern what business managers should do? This also leaves room for much more descriptive material from outside fields, in addition to the normative.

b. Other Levels of Analysis in Occupational Ethics

Consideration of occupational rules, as we have seen, is but the lowest of four overlapping levels logically required in the ethical analysis of all occupations, including the practice of law and the management of business. Occupational rules must be justified in terms of the goals of the occupations they constitute; those occupations must be justified by the requirements of the systems they implement; those systems must be shown to serve shared societal values. What is true at the fourth and lowest level of analysis is also true at the higher three: Business ethics is substantially richer than legal ethics. And the reason is the same: In legal ethics, the "law of lawyering" tends to crowd out not only the study of optimal occupational norms, what we have called legal ethics proper, but also the normative analysis of everything else: the legal profession, the legal system, even justice itself. In business ethics, by contrast, there simply is no competing internal body of material demanding—and receiving—attention. This section briefly addresses the coverage of the three higher levels of analysis, first in law, then in business.

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49. *See* L. Raymond Patterson, *Wanted: A New Code of Professional Responsibility*, 63 ABA J. 639, 639 (1977) ("The time has come to renounce completely the fiction that ethical problems for lawyers are matters of ethics rather than law."); L. Ray Patterson & Thomas B. Metzloff, *Legal Ethics: The Law of Professional Responsibility* (3d ed., Matthew Bender & Co. 1989) ("Using the legal approach, we treat the rules of ethics as merely a subset of legal rules . . . . Ethical rules focus on individual and voluntary moral responses, not legally mandated duties.").

50. Simon, *supra* n. 12, at 1113-14 ("The discretionary approach . . . rejects the common tendency to attribute the tensions of legal ethics to a conflict between the demands of legality on the one hand and those of nonlegal, personal or ordinary morality on the other.") (citation omitted).

51. *Id.* at 1114.

i. Law

Not only does the law of legal ethics displace the ethics at the lowest level of analysis, that of occupation-specific rules; it displaces the other, higher, levels of analysis almost entirely. This is particularly apparent at the next higher level, the analysis of the role of the occupation of law.

Occupational Role: The Practice of Law

The legal profession has been the subject of extensive study, particularly by historians and social scientists. But borrowings from this body of scholarly work in legal ethics texts are much more the exception than the rule; indeed, the two exceptions tend strongly to prove the rule. For one thing, the typical text includes this material primarily, if not exclusively, in areas where the legal profession's monopoly or its anticompetitive practices have come under sustained or successful attack. For another, texts that draw from this body of scholarship more systematically tend to be adopted less widely.

Fundamental System: The Law

Much the same is true at the next level, the normative analysis of the legal system as a whole and with respect to its constituent parts. This level of analysis might be called "the ethics of law;" its focus is how the legal system as a whole, or particular laws or sets of laws, measure up under ethical analysis. On the wholesale side, as we have seen, the basic question is as old as Plato's Republic: "What is justice?" Some of this is done in law school courses on jurisprudence, though the focus there is typically more descriptive than normative, more "what is law" than "what law is good."

At the retail level, the analysis of particular laws or sets of laws, legal ethics fares somewhat better. The more theoretically ambitious legal ethics texts raise fairly broad questions, such as: "Is the adversarial system comparatively better than the civil law inquisitorial system?"[52] And the typical texts tend to cover a number of narrower, more specific questions, such as the policy basis for the attorney–client privilege[53] and whether the privilege should be an absolute rule or a balancing test.[54] As these examples suggest, however, the normative analysis tends to be fairly narrowly focused on specific rules, and, beyond that, on rules drawn from the law governing lawyers, not the law more generally. Legal ethics texts typically leave the latter to courses on specific substantive and procedural elements of law. Thus, for example, legal ethics texts would not typically take up the policy basis

52. *See e.g.* Rhode & Luban, *supra* n. 8, at 115-25 ("Comparative Perspectives: 'Adversarial' Versus 'Inquisitorial' Procedures").

53. *See e.g.* Thomas D. Morgan & Ronald D. Rotunda, *Professional Responsibility: Problems and Materials* 300, 353-56 (8th ed., Found. Press 2003).

54. Rhode & Luban, *supra* n. 8, at 194-95.

or ethical foundations for even the very general principles of family law, tort law, or contracts.[55] In fact, the phrase "the ethics of law" is seldom used in this way in legal academia, and this is never the principal meaning of "legal ethics."

Ethics "Proper"

The highest level of analysis, ethics proper, gets even shorter shrift in legal ethics courses, if the selected casebooks are any indication. Typically, an introductory chapter sets out the classical schools of ethical philosophy in relatively few pages, promising to show their relevance to legal ethics in particular contexts throughout the balance of the book.[56] This promise, even when made, is seldom really kept. The same is true of the main treatises in the field.[57]

ii. Business

In business ethics, as in legal ethics, what occurs at the level of rules analysis also occurs at the higher levels of analysis. The effects are as pronounced as in legal ethics, but in the opposite direction. In the absence of much "business of ethics" that corresponds to the "law of lawyering," business ethicists focus not only on the optimal rules for business managers, but also on the ethical component of other, higher phases of analysis.

Occupational Role: Business Management

The next higher level of analysis, which examines occupational roles, gets less explicit attention than those above or below it. In part, this may simply reflect the unfortunate reality that sociologists and other extramural scholars, along with business ethicists themselves, have not traditionally thought of business as a profession.[58] As a result, there may be relatively less extramural material for business ethics scholars to borrow.

On the other hand, business ethics' relative lack of attention to the level of occupational roles may be more apparent than real. In fact, most textbooks seem not so much to slight this level, as to combine it with the next higher. They tend, in other words, to analyze the occupation of business management along with the fundamental social institution it advances,

55. Business ethics offers at least one striking contrast here. Bowie and Duska's textbook offers a section on "Criteria for Good Law," derived from Lon Fuller's classic *The Morality of Law* and applied to a range of examples from several legal fields, including administrative law, employment law, and torts. Bowie & Duska, *supra* n. 37, at 104-08.

56. *See e.g.* Morgan & Rotunda, *supra* n. 53, at 14-23 ("Some Contributions from Moral Philosophy to the Study of Legal Ethics").

57. *See e.g.* Wolfram, *supra* n. 11, at 68-78 ("Ethics and Moral Philosophy").

58. *See* Atkinson, *supra* n. 3, at 481 (noting that "treatments of professional ethics frequently exclude treatment of business ethics on the grounds that business administration is not a proper profession"); *id.* at n. 56.

the market. The common heading would be something like "the ethics of business."[59] In fact, this shade of meaning is quite noticeable in business ethics as the term is currently used.

Fundamental System: The Market

At this level of analysis, business ethics texts are exceptionally rich. As we have seen, the analysis of fundamental institutions has both a "wholesale" and a "retail" aspect: how capitalism and the market system as a whole, and how particular business practices or aspects of capitalism, measure up under ethical analysis. Business ethics texts tend to cover both in considerable detail. At the wholesale level, business ethics texts frequently devote a full chapter, sometimes even an entire section, to evaluating the claims of capitalism, on its own merits and in comparison with other systems.[60] By contrast, as we have seen, this level of analysis is almost wholly lacking in legal ethics texts.

The difference is also apparent in coverage at the "retail" level, the normative foundations of particular aspects of capitalism or substantive areas of business enterprise. These "retail" aspects, again, are widely covered in business ethics texts. Thus, for example, business ethics texts frequently include extended treatments of environmental issues,[61] employee rela-

59. *See e.g. Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8, at 31-227; W. Michael Hoffman & Robert E. Frederick, *Business Ethics: Readings and Cases in Corporate Morality* 1-3, 43-45 (3d ed., McGraw-Hill, Inc. 1995).

60. *See e.g.* Archie B. Carroll, *Business & Society: Ethics and Stakeholder Management* 1-80 (2d ed., South-Western Publg. Co. 1993) (Part I, "Business, Society and Stakeholders"); Richard T. De George, *Business Ethics* 141-391 (4th ed., Prentice Hall 1995) (third and longest section of the book contains chapters on "Justice and Economic Systems" and "American Capitalism: Moral or Immoral?"); Thomas Donaldson & Thomas W. Dunfee, *Ethics in Business and Economics* 1 (Ashgate Publg. Co. 1997) (Part I, "Ethics in Economic and Social Systems"); *Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8, at 31-227; *Ethical Theory and Business*, *supra* n. 27, at 609-61 (Ch. 9, "Social and Economic Justice"); Hoffman & Frederick, *supra* n. 59, at 43-119 (Part I, "Ethics and Business: From Theory to Practice," includes a chapter on "Theories of Economic Justice"); Tony McAdams, James Freeman & Laura Pincus Hartman, *Law, Business, and Society* 1-129 (5th ed., Irwin/McGraw-Hill 1998) (Part I, "Business and Society," includes chapters on "Capitalism and the Role of Government" and "The Corporation and Public Policy: Expanded Responsibilities"); Shaw, *supra* n. 14, at 84-121, 124-98 (Part I, "Moral Philosophy and Business," contains a chapter on "Justice and Economic Distribution"; Part II, "American Business and its Basis," includes chapters on "The Nature of Capitalism" and "Corporations"); *see also* Bowie & Duska, *supra* n. 37, at 17-42, 58-64, 86-93 (Ch. 2, "The Moral Responsibilities of Business").

61. *See e.g.* De George, *supra* n. 60, at 195-219, 535-62 (Ch. 8, "The Social Audit, Risk and Environmental Protection," Ch. 20, "Famine Natural Resources, and International Obligations"); *Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8, at 522-64 (section on "The Environment"); *Ethical Theory and Business*, *supra* n. 27, at 223-36 (section on "Risk to the Environment"); Hoffman & Frederick, *supra* n. 59, at 440-86 (Ch. 11, "The Environment"); McAdams, Freeman & Hartman, *supra* n. 60, at 753-88 (Ch. 17, "Environmental Protection"); Shaw, *supra* n. 14, at 386-417 (Ch. 11, "The Environment"); Milton Snoeyenbos, Robert Almeder & James Humber, *Business Ethics: Corporate Values and Society* 447-81 (Prometheus Books 1983) (Ch. 8, "Business and the Environment").

tions,[62] and other topics that law schools relegate to special courses. Again, this may reflect the fact that business ethics has less material than legal ethics to cover at the lower levels of analysis, particularly minimum standards of practitioner conduct. In addition, topics like these, covered in law school in other courses, may not be covered in other courses in business school. In any case, the upshot is a great deal more attention to these topics in the typical business ethics text than in its legal ethics counterpart.

Ethics "Proper"

This extensive systemic analysis, at both the wholesale and retail levels, almost necessarily presses business ethics to a broader and more abstract question: What's so good about the goods the market provides and the ways it provides them? Thus business ethics is also rich, finally, at the highest level of occupational ethics, or "ethics proper." This also results, in perhaps greater measure, from its greater emphasis on optimal norms as applied to business managers. Pressed upward at every lower level of analysis, business ethics almost necessarily devotes more space to the specification of ethical norms and the exploration of their grounding. Accordingly, business ethics texts typically explore not only a relatively wide range of substantive ethical issues,[63] but also more abstract metaethical issues.[64]

62. *See e.g.* Bowie & Duska, *supra* n. 37, at 58-64, 86-93 (sections on "Hiring" and "Affirmative Action," subchapter on "Obligations to Employees"); Carroll, *supra* n. 60, at 415-541 (Part 4, "Internal Stakeholders and the Management of Them"); De George, *supra* n. 60, at 221-41, 361-449 (Ch. 9, "Whistle Blowing"; Ch. 14, "Workers' Rights: Employment, Wages and Unions"; Ch. 15, "Workers' Rights and Duties Within a Firm"; Ch. 16, "Discrimination, Affirmative Action, and Reverse Discrimination"); *Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8, at 323-63, 364-90 (sections on "Employee Rights and Responsibilities" and "Diversity"); *Ethical Theory and Business*, *supra* n. 27, at 268-440 (Ch. 5, "Rights and Obligations of Employers and Employees"; Ch. 6, "Hiring, Firing, and Discriminating"); Hoffman & Frederick, *supra* n. 59, at 249-389 (Part 3, "Work in the Corporation"); McAdams, Freeman & Hartman, *supra* n. 60, at 489-654 (Part IV, "Employer-Employee Relations"); Shaw, *supra* n. 14, at 201-341 (Part III, "The Organization and the People in It"); Snoeyenbos, Almeder, & Humber, *supra* n. 61, at 113-345 (Ch. 3, "Employee Obligations"; Ch. 4, "Hiring and Discharge"; Ch. 5, "Employee Rights").

63. *See e.g.* Carroll, *supra* n. 60, at 2-80 (Part I, "Business, Society, and Stakeholders"); De George, *supra* n. 60, at 33-108 (chapters on "Conventional Morality and Ethical Relativism," "Utility and Utilitarianism," and "Moral Duty, Rights, and Justice"); *Ethical Issues in Business: A Philosophical Approach*, *supra* n. 8, at 1-11, 61-97 ("Introduction to Ethical Reasoning" and "Ethical Reasoning in Practice"); *Ethical Theory and Business*, *supra* n. 27, at 1-49 (Ch. 1, "Ethical Theory and Business Practice"); Hoffman & Frederick, *supra* n. 59, at 86-90 ("The Important Ethics Questions"); McAdams, Freeman & Hartman, *supra* n. 60, at 39-46 ("Foundations of Ethical Theory"); Shaw, *supra* n. 14, at 2-83 (Ch. 1, "The Nature of Morality"; Ch. 2, "Normative Theories of Ethics"); Donaldson & Dunfee, *supra* n. 60 (Part I, "Ethics in Economic and Social Systems"); *see also* Bowie, *supra* n. 11 (Ch. 1, "Business and Moral Philosophy"; Ch. 2, "Value Systems"); Bowie & Duska, *supra* n. 37, at 17-93 (Ch. 2, "The Moral Responsibilities of Business"; Ch. 3, "Morality in the Practice of Business").

64. *See e.g.* De George, *supra* n. 60, at 37-46 (treatments of "Subjective and Objective Morality," "Cultural Relativism," and "Ethical Relativism"); *Ethical Theory and Business*, *supra* n. 27, at 8-11 (discussion of "Relativism and Objectivity of Belief"); Shaw, *supra* n. 14, at 13-14 (section on "Ethical Relativism"); Donaldson & Dunfee, *supra* n. 60 (collecting readings under the heading "Relativism and Convention").

The coverage of both sets of issues is typically more detailed than that in corresponding legal ethics texts.[65]

ii. Summary

Legal Ethics, embarrassed by the riches of law, becomes "the law of lawyering," focusing relatively narrowly on the minimal requirements of occupational norms. Its texts tend to include very little from the rich sociological literature on professionalism, even less from the vast literature on political liberalism, and almost nothing from the long line of religious and philosophical ethics. Business ethics, faced with the impossibility of covering only "the business of ethics" or "the business of business," focuses on "the ethics of business," broadly conceived, and covers that ground pretty comprehensively. Its texts contain much on capitalism and alternative economic systems, and more on ethics proper, both traditional schools and modern applications. In staking out this higher and greener ground, business ethics may be making a virtue of necessity. But it is a virtue nonetheless.

c. Ancillary Problems

If the last section's analysis is right, it is largely the rich prospect of teaching the law of lawyering that makes legal ethics less green than business ethics. That cannot, however, be the entire story. The mere fact that legal ethicists have lots of law to teach does not necessarily mean that they will teach little else. To better understand why, given the choice between covering law and covering other available material, they choose to cover law, we need to look at several additional factors. This understanding requires, in particular, a closer look at who teaches what to whom. All of this bears, in one way or another—sometimes as cause, sometimes as effect, sometimes as both—on the crowding of extra-legal material, including ethics, out of legal ethics.

i. Who Teaches

Comparing the post-graduate degrees of business ethicists and legal ethicists reveals an almost perfect inversion on several relevant points. As a nearly invariant rule, business ethics professors have advanced degrees outside business but not inside; legal ethics professors, by contrast, almost all have an advanced degree in law, but seldom in anything else. To be more precise, at the U.S. News top twenty law schools, 38 legal ethicists held a total of only six PhDs, all but one had JDs, and none had MBAs. At the top-twenty business schools, 24 business ethicists held a total of 20 PhDs. Many had JDs, but only one had an MBA.

65. *Supra* tbl. 2.

It seems likely that these differences in credentials are both a cause and an effect of the relatively great intramural content of legal ethics and the relatively small intramural content of business ethics. On the one hand, the heavy element of law in legal ethics would tend to keep non-lawyers out, even as the relative absence of "business" in business ethics should make entry easier for those trained in other fields. On the other hand, professors' self-selection into the respective fields would likely affect what they chose to teach once they are inside. Legal ethics professors, having been trained in law and little else, would tend to focus on law, at the expense of extra-legal material. Business ethics professors, trained exclusively in areas other than business, tend to bring materials from those extramural areas "in" with them.

ii. Whom We Teach

Legal ethics, though sometimes covered in undergraduate professional ethics surveys, is almost exclusively a graduate law school course. Business ethics courses, by contrast, are frequently offered to undergraduate business majors, from books designed for use in both those courses and MBA programs.

Why this difference? Law itself is a graduate, not undergraduate, field of study. Also, as their names unmistakably imply, undergraduate pre-law courses are preparatory for graduate study in the field. Business administration, by contrast, is a respected undergraduate major as well as a graduate professional program; the undergraduate degree is not necessarily, or even typically, a prelude to the graduate degree.

The fact that business ethics is an undergraduate as well as a graduate course means that it can include more cross-disciplinary material, for several reasons. For one thing, not all students taking the course will be majoring in business; indeed, some such courses are offered in departments like philosophy and religion. For another, even the business majors will, as undergraduates, likely be less narrowly oriented than those in professional school. Less committed to a career in the field, they can more comfortably call the basic assumptions of the field into question.[66] Business ethics texts, often written for both graduate and undergraduate courses,[67] can and apparently do take advantage of this opportunity. As we have seen, they tend to ask more fundamental questions, at greater length, than do legal ethics cour-

66. *See* Michael Bayles, *supra* n. 34, at ix ("examin[ing] professions from the viewpoint of the average citizen . . . renders the discussion relevant to those who are not planning to become members of [the profession] as well as to those who are.").

67. *See e.g.* McAdams, Freeman & Hartman, *supra* n. 60, at vi ("Our text conforms to the undergraduate and MBA 'Perspectives' portion of the American Assembly of Collegiate Schools of Business (AACSB) curriculum standards for accreditation"); *see also* Carroll, *supra* n. 60, at xvii ("It is intended primarily for undergraduate courses but could be supplemented with other materials to be appropriate for a graduate course.").

sebooks. Thus, for example, business ethics texts tend to spend much more time questioning the legitimacy of capitalism than legal ethics texts devote to comparable questioning of liberal democracy, the rule of law, or even the adversarial system. As one ethics scholar has noted, there is something distinctly unseemly about pacifists' holding mandatory "padres' hours" for soldiers in boot camp.[68]

Significant differences between business ethics students and legal ethics students occur not only between the undergraduate and graduate levels, but also at the graduate level itself. With respect to law schools, accrediting standards require not only that every school offer a course in legal ethics, but also that every student take that course.[69] In contrast, business school accrediting standards require that all business schools offer a course in business ethics, but not that all students take it.[70] Beyond that, virtually all state bars require that students pass a standardized, rule-based professional responsibility exam; aspiring business managers, of course, face no analogous hurdle.

What are we to make of this apparently greater insistence, on the part of the legal establishment, on the teaching of ethics? Let us reject two possibilities out of hand: First, that the legal establishment is more ethical than its business counterpart, and, second, that ethics is inherently more important in law than in business. It is more likely to be the reverse: Here yet again, the difference is the law in legal ethics, not the ethics. And this is but a variant of what we have identified as the primary cause of business ethics' greater greenness: there is no intramural, "business" component of business ethics that corresponds to the intramural, "legal" element in legal ethics.

Here, then, is a practical (if not very highly principled) reason for requiring an ethics course of all law students but not all business students. If lawyers do not know the law governing their own conduct in their representation of clients, they will get into trouble with the law itself, which is, after all, their special province. Business managers, by contrast, can hardly become experts on the legal requirements of their conduct, even in a special

68. Bernard Williams, *Professional Morality and Its Dispositions*, in *The Good Lawyer* 259, 266 (David Luban ed., Rowman & Allenheld 1984).

69. Stands. for the Approval of L. Schs. 302(b) (ABA 2000) (as amended Aug. 1974); *see also* Wolfram, *supra* n. 11, at 194 n. 62 ("The adoption of the amendment in late summer 1974 followed close on the heels of the involvement of many lawyers in the Watergate scandal.").

70. More precisely, the Association to Advance Collegiate Schools of Business (AACSB) does not require any specific ethics courses in the graduate business school curriculum. But the AACSB generally expects that the graduate management curriculum will develop knowledge in the area of "ethical and legal responsibilities in organizations and society." AACSB Intl. Eligibility Proc. and Stand. for Bus. Accreditation 18, http://www.aacsb.edu/accreditation/business/standards01-01-04.pdf (Jan. 1, 2004). In 2001, the American Assembly of Collegiate Schools of Business changed its name to Association to Advance Collegiate Schools of Business. AACSB International, *Name Reference and Logo*, http://www.aacsb.edu/members/nameref.asp (accessed Apr. 20, 2004).

course; for those issues, presumably, they would call a lawyer. And, as we have seen, to the extent that there is any special "business" of ethics, it could well be covered in other, more general, courses—marketing, for example.

If the reason for requiring all law students to take legal ethics is uncertain, one result is pretty clear: Legal ethics professors, unlike their business ethics counterparts, face a captive audience. That very difference, in turn, is quite likely to affect the content of the courses. Legal ethics students, who have no choice but to take the course, will likely demand more law; business ethics students, given the option to take the course, will opt out if they find the extramural component bulks too large for their tastes.

And make no mistake, the modern university classroom is, in several important respects, very much a market-driven affair. Professors who teach unpopular material in their courses will lose students to colleagues who teach the same course with more popular content. In the absence of alternative offerings, students will register their disgruntlement in student evaluations. Students will vote, in other words, either with their feet, or with their ballots, against what they take to be overly theoretical or interdisciplinary offerings.[71]

In summary, legal ethicists, usually holding JDs but not PhDs, teach every law student but no undergraduates. Business ethicists, usually holding non-business PhDs but not MBAs, often teach undergrads but rarely MBA students. These differences almost certainly contribute substantially to the greater greenness of business ethics.

iii. What We Teach

We have focused so far on why legal ethics occupies itself mostly with the lower level of occupational analysis, concentrating, even there, on minimal rather than optimal standards. Much of that, we have seen, has to do with the large body of law, particularly the law governing lawyers, that falls within legal ethics' purview. But, as we have seen in this section, other factors contribute to legal ethics' focus on law. These include our own training in law and our students' demand for law.

That raises a final factor: not so much the quantity of law taught in the particular legal ethics course, but the quality of law taught in law school generally. The study of law itself need not be either narrowing, at the expense of extramural material, or lowering, to the exclusion of higher levels of analysis. Law, broadly conceived, would itself incorporate those other disciplines and levels of analysis where business ethics has shown great interest, and shared them with its students. The problem here is that law, narrowly conceived, claims autonomy from just those disciplines. And what is true of legal ethics in comparison with business ethics tends to be

71. *See* Albert O. Hirschman, *Exit, Voice, and Loyalty* (Harvard 1970).

true, more generally, of law schools compared to business schools. We have already seen that there is no "business" in business ethics to compare with the "law" in legal ethics. What we need to see here is that, although there is certainly "business" in business school, it differs significantly from the "law" in law school; particularly in its interdisciplinary orientation.

This difference has both a theoretical and a practical aspect. On the practical side, it is possible to teach law as simply a set of rules, divorced from either their practical application or their theoretical underpinnings. This is, after all, the way many layfolk conceive of law; it is, more surprisingly, the way law is tested on virtually all bar examinations. It is, by contrast, virtually impossible to conceive of a business school analogue to this "law-as-rules" attitude toward law. The closest approximation, which amounts to a kind of reductio ad absurdum, would be to think of business school as covering nothing but accounting, teaching the rules of recording the making of profits, as opposed to the making of profits. This sort of clerical training is, of course, widely available, in programs devoted to bookkeeping. But these programs are never confused with their more sophisticated siblings, schools of business administration. In law, on the other hand, such confusion is both old and perhaps ineradicable.

What is more, and worse, is that this popular confusion of law with rules, and of legal education with the learning of rules, has two peculiar theoretical cognates, both false, but both confusing. Positivism, an ancient and still honorable school of jurisprudence, maintains that law is something like a system of rules. Ironically, from the present perspective, the early positivists' purpose in isolating law from other disciplines, particularly moral philosophy, was to expose law, thus isolated, to criticism from those very disciplines.[72] The basic point was this: If a law can be unjust (or otherwise normatively problematic) and still be a law, it can be criticized as a law precisely on the grounds that it is unjust (or otherwise normatively problematic). This mode of analysis obviously presses students of the law to more extradisciplinary study, not less. But, by isolating law as an independent system, positivistism, in bastardized form, could lead to the uncritical study of that system alone, uninformed by any additional study or analysis.

A related abuse besets another theoretical approach to law, and tends to constrict the legal academy's conception of law in another direction. As positivism, in bastardized form, tends to separate the study of legal rules from their connection with higher norms, the lingering tradition of American legal formalism tends to separate academic law from other disci-

72. This was clearly the case of the nineteenth century English positivist, John Austin, who wanted to subject law to the utilitarian critique of his mentor, Jeremy Bentham. *See* J.W. Harris, *Legal Philosophies* 24-25 (Butterworths 1980).

plines.[73] Legal formalism thus constricts law horizontally, narrowing it, even as positivism constricts it vertically, lowering it.

The nefarious influence of formalism on law's interdisciplinarity is doubly ironic. The first irony is that, by trying to make law a respectable, scientific discipline, the formalist of the late nineteenth and early twentieth centuries cut law off not only from the humanities, but also from the social sciences. Law, for them, was a science, but a very peculiar, self-enclosed science. The data of that science were in the books of law, mostly the reports of judicial decisions; the lawyer's laboratory was the library, a library with no windows and highly artificial lighting. There the lawyer-scientist was to dissect the law to find its inner logic, the articulation of its components as a complex but self-enclosed system.

This produced the second irony of legal formalism's isolation, its idolization of the case method. The method of both legal research and legal education in legal formalism is the analysis of judicial cases. This focus predictably turned academic law increasingly away from other academic disciplines and inward, not only upon law itself, but also upon a fairly small subset of law. This approach, pioneered at Harvard Law School and strengthened by its prestige, became within a generation of its inception in the 1870s the model for aspiring law schools all over the country. Indeed, so powerful was the appeal of the case method that it became the model, early in the twentieth century, for the new Harvard Business School as well.[74] And, as Harvard Law School's prominence made the case method the model for law schools nationwide, so did the Harvard Business School for business schools.

But here, ironically, the similarity abruptly ends. When business schools borrowed the case method from law, the effect on interdisciplinarity was very nearly the opposite; the case method in business schools has tended to foster, rather than forestall, interdisciplinarity. The reason for this different effect lies in the difference between what law and business take as cases. In law school, as we have seen, cases are the decisions of courts, reported by the courts themselves and analyzed to discover their special, legal, logic; in business school, cases are the actual activities of businesses,

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73. This section follows the standard account of Langdell's development of the case method and legal formalism at Harvard. *See* Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 Yale L.J. 1059, 1074 (1999); Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* 35-50 (U. of N.C. Press 1983).

74. *Ethical Theory and Business*, *supra* n. 27, at 43 ("When the Harvard Business School was opened in 1908, its first dean, Edwin F. Gay, adopted the [Harvard] Law School curriculum as a prototype for courses on commercial law and eventually as a model throughout the business school."); Donald K. David, *Foreward* in *The Case Method at the Harvard Business School* vii, vii (Malcolm P. McNair ed., McGraw-Hill Book Co., Inc. 1954) (although Gay, first dean of the Harvard Business, introduced the case method there, it only flourished under his successor, the legally trained Wallace B. Donham).

reported by business academics[75] and analyzed for insights into what works, and what does not.[76] The case method thus pressed legal scholars more deeply into law, using the tools of their own trade, even as it drew business scholars out of business, into a whole range of social sciences, to discover ways of doing business better.[77]

In legal academia, most fortunately for interdisciplinarity, the insularity of legal formalism's version of the case method led to a dramatic, and largely successful, reaction, American Legal Realism.[78] If formalism had swept all before it by World War I, Realism had taken the field by the advent of World War II. Where formalism at least implicitly encouraged the isolation of law from other academic disciplines, including the social sciences, Realism quite explicitly borrowed from those disciplines, especially the social sciences. Virtually all legal academics now view formalism's intensely legalistic introspection as a serious wrong turn; in that sense, we are all Realists now.

But if formalism's theory of law's autonomy is discarded, its version of the case method is still firmly in place. In the wake of the Realist revolution, many law school texts are subtitled "Cases and Materials," with the latter referring mostly to interdisciplinary borrowings. But law's teaching texts are still universally referred to as casebooks, and decisions of appellate courts still dominate their pages.

Thus, in law school generally, as in legal ethics particularly, law tends to crowd out interdisciplinary materials. Law school, like legal ethics, suffers from an embarrassment of intradisciplinary riches. What is more, the law that tends to be included at the expense of interdisciplinary borrowings tends to be law rather narrowly conceived, the old formalists' cases rather than the post-Realists' broader conception. Here is the ultimate irony: Law,

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75. By the time of Dean Donham, the standard method was to have research assistants do the actual field work and initial write-up of cases, under the direction of a faculty member. *The Case Method at the Harvard Business School*, *supra* n. 74, at 32.

76. *Ethical Theory and Business*, *supra* n. 27, at 44 ("Cases are not primarily used to illustrate principles or rules, because the latter abstractions are invariably inadequate for final resolution in real-world business situations."); *id.* ("This method [as used in business schools] also avoids the authority-based method relied on in law schools, where judges and the body of law are overriding authorities.").

77. David, *supra* n. 74, at viii ("It is one of the great strengths of the case approach [in business schools] that, by its emphasis on the process of business decision making, it forces this needed synthesis of a variety of social disciplines."); David N. Ulrich, *The Case Method*, in *The Case Method of Teaching Human Relations and Administration* 25, 26 (Kenneth R. Andrews ed., Harvard U. Press 1955) ("For most students, the case approach creates an incentive to acquire knowledge, since the student can continually perceive his need for knowledge in dealing with problems requiring action."); *see also Ethical Theory and Business*, *supra* n. 27, at 45 ("Studying cases in business ethics is facilitated by a knowledge of the history of ethics and types of ethical theory."); Thomas Donaldson, *Case Studies in Business Ethics* 17 (Thomas Donaldson & Al Gini eds., 4th ed., Prentice-Hall 1996) ("Cases alone are not sufficient when teaching business ethics and should be augmented by theoretical material."); *see also* Carroll, *supra* n. 60, at xix ("Many of the cases in this book carry ramifications that spill over into a number of areas.").

78. *See* Harris, *supra* n. 72, at 93 (summarizing the outlook of the realists).

one of the oldest of university disciplines, tended early in the last century to turn its back on its sibling disciplines; business, one of the university's newest departments, has from its inception in the very same era been bound to borrow from its older brethren. In Realism and its progeny, legal scholarship has aggressively reintegrated itself into the university. But in its pedagogy, the case method as applied in law school, the tradition of law's era of isolation remains.

IV. Prescription and Prognosis: Growing Greener Grass—in Both Fields

If my diagnosis in the prior section is right, the problem of legal ethics has two dimensions. We in legal ethics do not look far enough afield for our insights, and we do not look high enough up in our normative analysis. The cure for both problems, I believe, lies in the epigraphs with which we began. This concluding section calls for us to refill the prescriptions of Louis Brandeis and John Henry Newman for a more publicly spirited professionalism.

A. Expanding the Brandeisian Professionalism Project

My first recommendation for fortifying both legal and business ethics is what I would call the Brandeisian professionalism project. As relevant to our purposes, this project has three related components: recognizing the practice of law as a business (without embarrassment), acknowledging business management to be a profession (without reservation), and cultivating the best of both (with proper education). (As we shall see, the parentheticals are as important as the phrases they qualify).

i. The Practice of Law as a Business (Without Embarrassment)

It is of profound significance to the legal profession that Louis Brandeis, one of the last century's greatest jurists and legal academics, first made his living as a private practitioner—indeed, as a corporate lawyer. He did not see this as a derogation from a once-noble professional status; he saw it, rather, as something close to the hope of the modern world. In an essay entitled "The Opportunity in the Law," Brandeis harkened back to de Tocqueville's ideal—in "Democracy in America"—of lawyers as America's "highest political class," mediating the interests of the rich and the poor.[79] He saw no inconsistency between being paid by his corporate client and being attentive to the needs of a wider constituency. Rather, even in matters of direct conflict between his corporate clients and other identifiable parties, he felt compelled to act as what he called "the lawyer for the

79. Brandeis, *supra* n. 1, at 314.

situation" to ensure an equitable outcome for both sides.[80] More generally, in matters affected with a wider public interest, he felt it appropriate to act as what he called "the people's lawyer."[81]

To see the significance of Brandeis's position, we need to appreciate the two sides from which it has been challenged. On the one hand, he was roundly attacked for divided loyalties, for looking beyond the narrow interest of his client, what we have identified as the minimal requirements of the lawyerly role, to optimal requirements. This attack, which very nearly cost him his appointment to the United States Supreme Court, has lost much of its force in the decades since. Our "official lawyer codes" generally permit—although, significantly, they never require—lawyers to look beyond the narrow interests of their clients, even in private practice.[82] The organized bar, which led the attack on Brandeis's confirmation,[83] has long since accommodated itself, at least publicly and formally, to his position,[84] which scholars have elaborated into a marvelous set of optimal rules for both lawyers and business managers.[85]

The second line of attack, on the other hand, has been more subtle, more insidious, and more successful. Unlike the first, it has not been a frontal assault, but a steady and insistent undermining. As such, it is aimed at the foundation of the Brandeisan system: the proud acknowledgement that law practice occurs mostly in the market, mostly for private clients. Both the subtlety and the insidiousness of this sapping campaign are clearest in an oft-quoted phrase from one of Brandeis's contemporaries, Roscoe Pound. According to Pound, the term "profession" "refers to a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood."[86]

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80. *See* Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 66 (Oxford U. Press 1976) ("Brandeis, an opponent claimed, 'acts the part of a judge toward his clients instead of being his clients' lawyer.'"); *see also* Luban, *supra* n. 33, at 170-72 (summarizing Brandeis's position on client counseling).

81. Brandeis, *supra* n. 1, at 321.

82. *See* Model Code Prof. Resp. EC 7-8 (ABA 1969) ("In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."); Model R. Prof. Conduct 2.1, cmt. (ABA 1983) ("It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.").

83. Auerbach, *supra* n. 80, at 66 ("Brandeis's opponents, drawn largely from State Street law firms and from the American Bar Association, could plausibly view the Boston people's attorney as a threat to their restricted professional world.").

84. *See* Wolfram, *supra* n. 11, at 730 (describing and defending Brandeis's practice of mediation between clients).

85. *See* Atkinson, *supra* n. 3, at 496-505 (outlining parallel development, in legal ethics and business ethics, of positions that shared public norms beyond mere legality and profitability should constrain lawyers and business managers).

86. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 5 (West 1953).

The affirmative part of the definition would cause Brandeis no concern. He preached, at least as loudly as Pound, that law is a learned and public-spirited vocation; what's more, Brandeis literally practiced what he preached. Indeed, no mean wordsmith himself, Brandeis might have admired Pound's skillful rhetoric in stating this case. Note how every operative word in Pound's definition of profession brims with positive associations: the admirable striving of "pursuing" an object that is an "art," not merely a science, much less a trade; an art that is loftily "learned," in a "spirit," not just a mode or manner, that is itself a quasi-religious vocation, a "calling," not alone but in a "common," a fellowship, all devoted to "service"—a service that, having been identified as "public," needs no further commendation, because none is higher. This is no mere philosophy; it is no mean poetry. Its target is much less the head than the heart.

The organized bar, in its first line of attack on Brandeis, pilloried him for attending to private parties on both sides of his representations;[87] Pound, speaking in defense of the organized bar—indeed, under its sponsorship[88]—magically removes private parties from his ideal of legal representation altogether. This second line of attack, as I have said, is far more subtle than the first.

Here the real work is in the negative—I would even say sinister—part of Pound's definition. The credit Pound initially gives private practitioners with his right hand he immediately withdraws with his left. On the one hand, he praises professions for their learning, their common calling, their public spirit; on the other hand, he all but banishes the market. Reading his definition of a profession, you glimpse only at the far margin what we placed at the center, what I called the affirmative, minimal duties of the lawyer and the business manager: advancing client ends and making a living.[89] In Pound's definition, the private clients for whom we work disappear altogether, and getting paid for our work becomes an embarrassing afterthought. Having to earn your living at the law, we are told in the most dubious of terms, the double negative, will not necessarily undermine the worthiness of your work—if you keep such barely mentionable matters in their assertedly subordinate place. Alas, Pound commiserates with lawyers, we must eat our bread in the sweat of our brow. This is the praise of faint damnation.

Think for a minute: Where do we find lawyers who "may," rather than "must," earn their living at the law; lawyers for whom earning a living is merely "incidental," not economically essential, to their practice? Nowhere in Brandeis's ideal, as he practiced and preached it; nowhere, I would argue, in his world, or ours—or Adam Smith's. But Pound's ideal lawyer is

87. *See* Auerbach, *supra* n. 80.

88. *See* Pound, *supra* n. 86, at i (describing the work as "[a] study prepared for and published by the Survey of the Legal Profession [u]nder the Auspices of [the] American Bar Association").

89. *Supra* nn. 39-41.

not hard to find, if you know where to look: eastward, across the Atlantic, to England, and backward, beyond our liberal democratic and capitalistic age, past the Enlightenment and the Industrial Revolution, to the squirearchy of the early Georgian era. And, if the full truth be told, you should look back and away from our world nostalgically, preferably through the stained glass windows of a quaint Anglican parish church,[90] not analytically, through the critical lens of modern social science and historiography.

What you will see (if you don't squint too hard, or wipe the windows too clean) is the Anglophile's fantasy of a lawyerly family: an affable English country squire, living comfortably in his ancestral hall, on the earnings of his inherited lands, which are tilled by his loyal peasants. One son, invariably the eldest, will eventually stand in his stead, having inherited the family estate intact under the rule of primogeniture. All his daughters must be married well, preferably "up," into families adorned with higher hereditary titles and greater agricultural holdings; or, faux de mieux, "down" into the economically rising and socially climbing middle class. His younger sons present less of a problem than daughters. They can be placed in the learned professions: law, medicine, and the clergy.

Leaving aside the latter two, let's focus, with our squire and pater familias, on the law. It is the profession most particularly useful to the dynastic needs of the family, which depend on complex inter-generational land transfers and successful defense of frequent, and potentially ruinous, lawsuits.[91] More to the point, law is better suited to both the present qualifications and the future needs of the younger son himself. Having matriculated, perhaps, at Oxford or Cambridge, but probably without receiving a degree, the young squire will have dabbled a bit in the Classics and mostly mastered the manners of upperclass refinement.[92] At the Inns of Court, this dilletantish course will prove anything but an impediment. No serious academic training has occurred there since the upheavals of Cromwell's time, fully a century before.[93] Life in the Inns is essentially a social affair; what little common law education there is in England at the time occurs through private study and a kind of informal auditing in the courts themselves.[94] A new academic course on the English common law is lately being offered in Oxford itself. But the old squire wisely elects against it; it offers no real

90. *See* F.S.C. Northrop, *The Meeting of East and West* 165 (MacMillan 1946) (describing the rural parish chapel of the Church of England as the central icon of Anglicanism in particular and Anglophilia in general).

91. "Lawyers were in constant demand to assist landlords with manorial courts. . . . Professional advice was sought in property deals, marriage settlements and inheritance arrangements." E.W. Ives, *The Common Lawyers of Pre-Reformation England* 12 (Cambridge U. Press 1983).

92. Martha McMackin Garland, *Newman in his Own Day*, in Newman, *supra* n. 2, at 267 ("University education at both Oxford and Cambridge had sunk to a shockingly low standard during the eighteenth century.").

93. David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* 125-26 (Oxford U. Press 2000).

94. *Id.* at 131-44.

entrée into the practice, and it will quickly decline, immediately after the initial chairholder's death, into almost complete insignificance.[95]

For all these reasons, the Inns of Court are ideally suited, not just to the young squire's limited academic attainments,[96] but also to his future social and economic aspirations.[97] As to the former, he need never think of himself as engaged in anything so mean as trade or business.[98] To be sure, he may be well recompensed for his private representations—indeed, many of his fellows at the bar have almost certainly come there largely for that remuneration.[99] But these payments will carefully be styled as gratuities bestowed by grateful clients, not fees paid for intellectual labor sold and bought.[100] Whether really successful or not, he will most likely live comfortably; positions at the bar are few, the educational qualifications being a substantial, if largely artificial, barrier to entry. And, in recognition of that learning, mythically associated with the medieval university though in fact completely divorced from it, he will bear the title "esquire." If highly successful, he may do even better for himself and his branch of the family. With his "gratuities" he may be able to buy an estate of his own, perhaps one with a noble title attached, and thus ascend above even his elder brother in the social measure that really matters, land and title.[101]

This elaboration on the ideal Pound propounded for the ABA is, of course, merely a condensation of what the heroine of the standard nineteenth century English novel is looking for in a husband. Lawyers of Pound's persuasion don't style themselves "esquires" for nothing. That empty honorific speaks volumes of nostalgic lawyerly Anglophilia and atavistic feudal status-anxiety. Pound implies that we should somehow be embarrassed that we make our living as lawyers, that we get paid for what we

95. *Id.* at 122-24 (describing the limited success of Oxford's Vinerian Chair during the term of its initial holder, William Blackstone, from 1753-66, and its decline afterward).

96. *Id.* at 113 ("The only substantive 'qualifications' for entry into the Georgian inns of court were financial; the ability to pay the admission fees of the house and its termly duties."); *id.* at 114 ("Attendance at patrician schools [like Eton, Harrow, Westminster, or Winchester] does seem to have been increasingly common among men who became barristers.").

97. *See id.* at 109 (referring to "the profession's traditional reputation as a road to wealth and social status").

98. *Id.* at 111 ("[C]ommerce ultimately remained less publicly glamorous and prestigious" than law.).

99. "The only lay profession, the law was one of the main avenues of social advancement, and as a means of acquiring that solvent of social barriers—hard cash—it had few rivals." Ives, *supra* n. 91, at 2.

100. *See* Wolfram, *supra* n. 11, at 553 n. 98 ("Much fuss is sometimes made about the altruism of the English barrister, who is forbidden by professional honor from suing for a fee .... The picture is somewhat overdrawn."); *see also* William Howard Taft, *Ethics in Service* 9 (Yale U. Press 1915) (noting "the probability that early in English history professional services were deemed to be gratuitous.").

101. Lemmings, *supra* n. 93, at 111 ("[A]t a time when access to the peerage remained extremely limited, eminent lawyers were more likely to become lords in the Georgian Age than ever before, just as the profession generally [became] more socially prestigious and more profitable for the successful.").

do, that we are part of a market economy of personal achievement, private contract, and consumer satisfaction, not a feudal system of family status, noblesse oblige, and professional courtesy. Pound is quite clear on the ideal of professionalism: "Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose."[102] What makes us professionals, Brandeis teaches us, is not that we are in some sense, "above trade," somehow lifted above the sordid modern market by the pseudo-feudal honorific "esquire." Whatever the aristocratic pretensions of the English barrister, Brandeis demonstrated that the most public-spirited American lawyer could be—indeed, should be—unabashedly bourgeois.

ii. Business Management as a Profession (Without Reservation)

Brandeis felt no need to exalt lawyers above the market and out of the middle class for a very significant double reason. He saw the modern market as salutary, not sordid,[103] and he saw business managers as fellow professionals, not tawdry tradesmen.[104] Business managers, like lawyers, are professionals in part because they bring to bear on their work an essential concern for the public interest.[105] In the terms of our modern analysis of business ethics, proper managers adopt optimal, not merely minimal, standards. They do more good than the market requires and less harm than the law allows. Contrary to Pound's condescending assertion, "gaining a livelihood" is not "the entire purpose" of their calling.[106] According to Brandeis,

> In the field of modern business, so rich in opportunity for the exercise of man's finest and most varied mental faculties and moral qualities, mere money-making cannot be regarded as the legitimate end . . . . Real success in business is to be found in achievements comparable rather with those of the artist or scientist, of the inventor or the statesman. And the joys sought in the profession of business must be like their joys.[107]

In his vision of management, business is not a predatory, dog-eat-dog, zero-sum game; it is, rather, about making the pie bigger and better. Thus, for example, he extols the success of shoe manufacturing magnate William H. McElwain not so much for his "money-making faculty," but for introducing organizational innovations that revolutionized the industry, to the benefit of labor as well as capital and consumers. Here is Brandeis's high-

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102. Pound, *supra* n. 86, at 5.

103. *See e.g.* Brandeis, *Business—A Profession*, in *Business—A Profession*, *supra* n. 1, at 3. "The conception of trade itself has changed. The old idea of a good bargain was a transaction in which one man got the better of another. The new idea of a good contract is a transaction which is good for both parties to it." *Id.*

104. Thus, according to Brandeis, "Probably business has become professionalized as much as the Bar has become commercialized." Brandeis, *supra* n. 1, at 318.

105. Brandeis, *supra* n. 103, at 2-5.

106. Pound, *supra* n. 86, at 4.

107. Brandeis, *supra* n. 103, at 4-5.

est praise: "He found it a trade; he left it an applied science."[108] Similarly, he says of the founders of Filene's Department Store in Boston: "They have applied minds of a high order and a fine ethical sense to the prosaic and seemingly uninteresting business of selling women's garments."[109] The core of their achievement, again, was "not their growth in size or in profits."[110] It was, instead, that "they have demonstrated that the introduction of industrial democracy and social justice is at least consistent with marked financial success."[111]

Thus, for Brandeis, managers, every bit as much as lawyers, follow a vocation that is public spirited and socially productive. But managers are like lawyers in another respect, which brings us to the third insight of the Brandeisian professionalism project, the most important for our purposes.

iii. The Best of Both (With Proper Education)

Brandeis took quite seriously the claim that law is a learned profession, and he applied the traditional educational requirements of professional education to the emerging profession of business management. In a famous speech on opportunity in the law, which he reprinted in his book on business as a profession, Brandeis made this critical observation, which includes one of my epigraphs:

> I say special opportunities, because every legitimate occupation, be it profession or business or trade, furnishes abundant opportunities for usefulness, if pursued in what Mathew Arnold called "the grand manner." It is, as a rule, far more important *how* men pursue their occupation than *what* the occupation is which they select.[112]

Both law and business, according to Brandeis, are at once vocations and professions: vocations, because they should entail a commitment to the public good, not just the will of one's principle and the increase of one's own wealth; professions, because that commitment requires, not only technical training, but also grounding in fundamental social values and norms.[113] The need for grounding in these fundamentals brings us to my other prescription for legal ethics and business ethics: the Roman Catholic tradition of higher education.

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108. *Id.* at 6.

109. *Id.* at 9-10.

110. *Id.* at 9.

111. *Id.* at 11-12.

112. Brandeis, *supra* n. 1, at 313.

113. Brandeis, *supra* n. 103, at 2 (Professions are distinct from other occupations because, among other things, "the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill.").

B. *Honoring the Roman Catholic Tradition of Higher Education (Even from Outside)*

A law professor's praise of Brandeis's professional vision requires no introduction; by contrast, my recommendation of the Roman Catholic tradition of higher education requires a bit of background. These thoughts' first incarnation was a speech in St. Thomas Law School's magnificent new building in downtown Minneapolis; they now appear in fuller form as an article in its ambitious new law journal. In these forums, it hardly comes as a shock to commend the Roman Catholic tradition of higher education. But I do not mean simply to preach, as it were, to the choir; indeed, I myself am not even a member of the congregation. To give credibility to the commendation, I need to show why it can and should come from, and appeal to, those outside, not just inside, the Church itself.

For that, please forgive a brief lapse into autobiography. I myself am not a Roman Catholic, by either birth or belief. My mother's people are Scottish Presbyterian; my father's are English Puritans. My wife and I are deeply agnostic and devoutly humanistic. Against that background—indeed, more because of it than despite it—I earnestly commend and recommend the Roman Catholic higher education tradition. Let's look at each element in its turn.

i. Roman Catholic

I recommend it, most fundamentally, because it is Roman Catholic, and because the Roman Church is large in three related dimensions, each of which is relevant to our common ethical enterprise. First, the Roman Church is broad. It reaches beyond both the Northern and Western hemispheres; in the breadth of its reach, it invites us to expand the geographical base of legal ethics and business ethics beyond the wealthy North and the democratic West. Second, it is ancient. It is far older than both market economies and liberal polities; in its antiquity, it gives us an Archimedean perspective from which to examine both of the fundamental systems that underlie our two fields. And, finally, the Roman Church is wide. In particular, it is wider than either of the two principal wellsprings of western culture, the Greco-Roman classics and the Judeo-Christian scriptures, because it has drawn from and channeled them both.

ii. Higher Education[114]

The Church's great synthesis of Rome and Jerusalem is, of course, the foundation of its higher education tradition. In the Dark Ages, after the fall

114. I limit my commendation to Roman Catholic higher education for two reasons. First, it is more directly related to my immediate theme, the "greening" of legal ethics and business ethics. Second, I cannot in all good conscience commend Roman Catholic primary and secondary education in America without expressing serious reservations. *See* James G. Dwyer, *Religious*

of the Roman Empire, the Roman Church saved both classical and Biblical culture in the West. For this, we who are Protestants and we who are humanists should be as grateful as we who are Roman Catholics. If we had not had the Church of Rome, we would not have the church of Wittenberg or Geneva; without the Rome of the Papacy, we might not have known the Rome of the Republic, and we certainly would not have known it as early or as well.

In the High Middle Ages, the Church's cathedral schools and abbeys, and especially its universities, sponsored a revival of classical culture that rivaled Rome and Greece themselves. The culmination of that revival was indisputably the work of St. Thomas Aquinas, the patron saint of this paper's host institutions. In contemporary legal education, no institutions are more committed to deepening and broadening legal ethics and business ethics, to fostering and fertilizing all that I have identified as green and good in those neighboring fields.[115]

iii. Tradition

That, in the most immediate sense, is the Roman Catholic tradition of higher education on which we all, non-Catholic as well as Catholic, need to draw. But the tradition of education in the Roman Catholic communion has another, wider sense that is equally important to our common project in business ethics and legal ethics. The Roman Church has long reminded us—and we who are Protestant, especially we who are Genevan, have always needed reminding—that the history of the believing community matters, because the community's own belief, its very faith itself, grows. A living faith cannot be a static set of abstract propositions from which eternally valid conclusions are algebraically derived; it is not a fossil to be recovered from extraneous accretions by archeological digging. That erroneous belief is the besetting sin of Protestantism, from Martin Luther to modern fundamentalism.[116] Faith is, rather, an organism as alive as the

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Schools v. Children's Rights 44 (Cornell U. Press 1998) ("The evidence suggests that both Fundamentalist and [Roman] Catholic diocesan schools, to varying degrees, infringe the personal liberties of students, fail to develop in students important cognitive skills and/or to provide them with an adequate knowledge base, promote intolerance and/or dogmatism, undermine students' self-esteem, and engender excessive anxiety and resentment in students."); *see* Rob Atkinson, *The Legal Profession: Looking Backward: Reviving the Roman Republic; Remembering the Good Old Cause*, 71 Fordham L. Rev. 1187 (Mar. 2003) (calling for mandatory universal primary and secondary education in republican civic virtue and modern social and economic opportunity).

115. *See e.g.* Ryan Palmer, Speech, *Prospectus* (U. St. Thomas Sch. L., Minneapolis, Minn., Mar. 6, 2004) (copy on file with the *University of St. Thomas Law Journal*):

> Today's symposium also reflects an ideal of professional preparation articulated by the University of St. Thomas School of Law's mission statement. At St. Thomas, students are encouraged . . . to embrace interdisciplinary learning, which will enhance a legal education by providing "a broad understanding of global society's many challenges."

116. Nowhere is this more evident than in the Westminster Confession of Faith, the prime product of the confluence of Scottish Presbyterianism and English Puritanism:

community in which it lives and to which it gives life. It must grow, because the world in which the believing community lives changes.

Beyond that, in the case of the Roman Catholic Communion, the faith grows because it vitally interacts with a changing world. In the Roman Catholic Communion, the Church gives the world not just its Credo, but also its Apologia Pro Vita Sua. Indeed, the magisterial statement of the Roman creed, St. Thomas's Summa Theologia, is just such an apology.

Such an apology is not an expression of regret (though the Church, of course, has expressed regret, laudably and even lately); it is, rather, an invitation to dialogue. That dialogue is the mutual examination that Socrates believed would make our lives worth living, the coming and reasoning together that Isaiah believed would make our sins as white as snow. In that dialogue the Church offers to explain its beliefs to all who will listen, in their own terms; it also offers to listen, in those same terms, to the beliefs of any who will explain themselves. So, in the Middle Ages, Aquinas read the works of the pagan Aristotle; so he wrote the followers of the infidel Averroes. So his namesakes, the University of St. Thomas School of Law and the St. Thomas Law Journal, have conversed with me, the heretical heir of the Church's most persistently apostate children, the Reformation and the Enlightenment. I take that as good earnest of their openness to all conscientious comers; I can attest that their conversation is well worth the trip.

C. *Justice Brandeis's Modern Professionalism and Cardinal Newman's Classical Education*

Brandeis's professional vision for law and business, I believe, necessarily implies that professional education include both higher ethical analysis and broader interdisciplinary offerings. That, in turn, implies that professional education, unless it is to be largely remedial, must itself rest on a carefully prepared foundation. No one has better defined that foundation than John Cardinal Newman:

> This process of training, by which the intellect, instead of being formed or sacrificed to some particular or accidental purpose, some specific trade or profession, or study or science, is disciplined for its own sake, for the perception of its own proper object, and for its own highest culture, is called Liberal Education.[117]

> The whole counsel of God concerning all things necessary for his own glory, man's salvation, faith and life, is either expressly set down in Scripture, or by good and necessary consequence may be deduced from Scripture: unto which nothing at any time is to be added, whether by new revelations of the Spirit, or traditions of men.

Westminster Confessions of Faith, ch. I, art. VI (available at http://www.reformed.org/documents/wcf_with_proofs/ch_I.html).

117. Newman, *supra* n. 2, at 109.

Cardinal Newman offered these thoughts in 1852 as president of a new Catholic University in Dublin. His institution was at risk, he rightly foresaw, of friendly fire from an old conflict in British education. In the earliest days of the Enlightenment, in the latter seventeenth century, no less an eminence than John Locke had taken on the dilitantish Classicism of the great English universities.[118] At the height of the Enlightenment, in the middle of the eighteenth century, the Scotsman Adam Smith had enrolled at Oxford, only to leave in disgust at the low level of academic discourse he found there[119]—precisely the level, as we have seen, at which our prototypical young English squire was happily studying. Led by minds like Smith, the Scottish universities had, by the turn of the nineteenth century, produced a powerful critique of English higher education.

The case in favor of the Scots model, and against the English, came down essentially to this:

> The fact is that all professions have reached a stage when a single curriculum for an arts degree is neither possible nor tolerable for them, if universities intend to maintain their chief function of liberalising the professions. You must not judge of other universities by Oxford and Cambridge, for they are exceptional. The old English universities have not the same function as the Scotch and Irish universities. The former teach men how to spend a thousand [pounds] a year with dignity and intelligence, while the latter aim at showing men how to make a thousand a year under the same conditions.[120]

As Newman well knew, his critics "may anticipate that an academical system, formed upon my model, will result in nothing better or higher than in the production of that antiquated variety of human nature and remnant of feudalism, as they consider it, called 'a gentleman.'"[121] This "gentleman" is, of course, none other than the squire of Pound's professional questing.

Newman had been a student at Oxford during the first phase of this debate, and he had found his experience there profoundly positive. More a self-starter than our stereotypical squire, he immersed himself in the standard Classical course. The result was to radically alter not only the course of his own life, but also the history of both Oxford University and the Church of England. To make a long story short, Newman's study at Oxford led him fundamentally to question the Anglican religion of which Oxford had always been the chief intellectual pillar.

Though Newman permanently left Anglicanism for Catholicism, he never left Oxford in spirit, and he ultimately returned there in fact. In the

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118. *See id.*

119. *See* Bowie, *supra* n. 11, at 108-10.

120. Lyon Playfair, *Universities and Professional Education*, in *Subjects of Social Welfare* 369, 375-76 (2d ed., Cassell & Co., Ltd. 1889).

121. Newman, *supra* n. 2, at 3-4.

meantime, he found a way to reconcile Oxford with Edinburgh, liberal education with professional. The essence of his synthesis was to divorce classical education from its dilitantish, English feudal past and to wed it to the new, largely Scottish Enlightenment future. In his vision, the goal of liberal education was not politely refined country retirement but fully informed public service. In his words:

> There is a duty we owe to human society as such, to the state to which we belong, to the sphere in which we move, to the individuals towards whom we are variously related, and whom we successively encounter in life; and that philosophical or liberal education, as I have called it, which is the proper function of a University, if it refuses the foremost place to professional interests, does but postpone them to the formation of the citizen, and, while it subserves the larger interests of philanthropy, prepares also for the successful prosecution of those merely personal objects, which at first sight it seems to disparage.[122]

He was quite clear about how his version of liberal education would advance the professional life it deferred:

> The man who has learned to think and to reason and to compare and to discriminate and to analyze, who has refined his taste, and formed his judgment, and sharpened his mental vision, will not indeed at once be a lawyer, or a pleader, or an orator, or a statesmen, or a physician, or a good landlord, or a man of business, or a soldier, or an engineer, or a chemist, or a geologist, or an antiquarian, but he will be placed in that state of intellect in which he can take up any one of the sciences or callings I have referred to, or any other for which he has a taste or special talent, with an ease, a grace, a versatility, and a success, to which another is a stranger.[123]

In elaborating his concept of liberal education, Newman makes clear that his vision encompasses all that I have surveyed in my own commendation of the Roman Catholic tradition of higher education.[124] The fate of his *Idea of a University* nicely recapitulates his broader idea of intellectual progress. As we have seen, he believed, firmly in the Catholic tradition, that doctrine grows with the life of the believing community. I have suggested that part of that growth lies in the Church's fruitful interaction with the rest of the world. Such, appropriately enough, has been the fate of Newman's *Idea of a University*.

He originally wrote it as the defense of a new Catholic University in Ireland; the edition I read is published by Yale University, once a pillar of American Puritanism, now one of America's premier secular universities.

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122. *Id.* at 119.
123. *Id.* at 118.
124. *See id.* at 166 (especially Christianity and Letters).

As the editor of the Yale edition acknowledges, "[i]n an era when universities and colleges, their curricula, their missions, and their financing have become the center of both concern and controversy, it is fitting that Yale University Press bring out a new edition of this classic work in its series Rethinking the Western Tradition."[125] In the tradition of university education, which he saw as the necessary foundation of professional education, Newman's book has indeed become a classic.

Newman's embrace by Yale, like his earlier re-admission into the fellowship of his beloved Oxford,[126] has broader significance as well. It is no exaggeration to say that he is now not only a Cardinal of the Church, but also a saint of an even broader community. It is a community which, through apologies like his, has come to accept not just the development of particular dogmas—the Trinity and the Eucharist—but the very notion of dogma itself. In that community, of which the university is perhaps our principal institution, the only dogma is dialogue, and the most sacred texts are those that call us back together into that universal and eternal conversation. In that sense, Newman's *Idea of a University* is more than a mere classic; it is one of those meta-canonical works that define the canon itself, by creating the community of which the canon is the scripture.

Louis Dembitz Brandeis was, most famously, a justice of the United States Supreme Court; his appointment rankled the American legal establishment in no small part because he was the first Jewish appointee. John Henry Newman was, most famously a Cardinal of the Roman Catholic Church, whose conversion from the Anglican communion shook the foundations of the English ecclesiastical establishment. But these biographical differences between Brandeis and Newman, salient though they once were, are not nearly so significant now.

What matters most to us today lies beneath them. It is the fundamental commonality of purpose and method on which our shared professional hope is grounded. For Brandeisian professionalism to flourish in law and business, both our fields must be constantly watered, as Newman quite rightly foresaw, with the western classics. If, as I have argued, business ethics is the greener field, it is because its tenders have drawn longest and deepest from that wellspring of our common professional and civic culture.

V. CONCLUSION

From the field of legal ethics, we have looked over the artificial fence of modern academic specialization into the neighboring field of business ethics. From that perspective, we have seen that the grass over there is

125. Frank M. Turner, Editor's Preface, in *The Idea of a University*, *supra* n. 2, at ix.

126. Mindful of his formal break with Oxford when he converted to Roman Catholicism, Newman nonetheless dedicated the second edition to the fellows of Trinity College, Oxford, upon his return in 1878. *Cf. Note on the Life of John Henry Newman*, in *The Idea of a University*, *supra* n. 2, at xiii.

greener, more often enriched by interdisciplinary borrowings, and the ground higher, oriented more toward the top three levels of occupational ethics. Looking back at legal ethics, I have argued that we borrow less from other fields and ascend less lofty heights of our own because we already have much to cultivate at the lowest analytical level of legal ethics, the minimal requirements of "the law of lawyering."

Making matters worse, the sheep of our pasture, today's typical law students, are little inclined to follow even the best shepherd into higher, richer grazing. In part, they fear they will miss something of vital practical importance in our own field; in larger part, I believe, they are simply scared to make the trek into the more ambitious elevations of ethical analysis. To them higher ethical theory and broader interdisciplinary borrowings seem both impractical and unattainable. To overcome those twinned fears, we need to point them to two reassuring prominences: Brandeis's high road of public spirited private practice, in both law and business, and the Roman Catholic Church's lofty standards of university education for all professionals.

At the pinnacle of this latter promontory is my host insitutions' patron saint, Thomas Aquinas. My sincerest thanks, in his noble name, for this conversation; may it continue, in his generous spirit, until we, like him, encompass not just law and business, but the whole world.

For the sake of the faith I share with him, with Brandeis and Newman, and so, also, with you, Amen.