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RELIGION IS NOT TOTALLY IRRELEVANT TO LEGAL ETHICS

Monroe H. Freedman*

THERE is a familiar story about three stonemasons, each of whom is asked what he is doing. The first replies, "I am making a wall." The second says, "I am helping to construct a building." The third answers, "I am helping to build a great cathedral to celebrate the glory of God."

What if we asked the same question of three lawyers, "What are you doing?" The first might reply, "I am trying a case." The second, "I am serving my client." And the third, "I am participating in the administration of justice."

I think we would all agree that there is a significant progression in the self-defining responses of the stonemasons. But how about the lawyers' answers? Is it clear that there is a progression—in religious terms—in the way the lawyers see themselves? The Bible tells us: "Justice, justice shalt thou follow . . ."¹ The third lawyer, then, is fulfilling a religious precept by participating in the pursuit of justice. But what about the second lawyer? Is his function any less significant, religiously? If we take seriously the injunction, "[L]ove thy neighbor as thyself,"² then it seems to me that the simple service of one's client is the essence of religion, as well as of justice. Professor Leslie Griffin has written, "If too much emphasis is given to the lawyer's theological beliefs, the lawyer may lose sight of her client's interests."³ I would rephrase that to say, "If a lawyer loses sight of her client's interests, she has almost certainly lost sight of her theological beliefs as well."⁴

My first point, then, is that even people who share the same or similar religious traditions can disagree over which religious precepts are more important. And it can matter. For example, if you needed a lawyer, would you rather be represented by the third lawyer or the second?⁵

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1. *Deuteronomy* 16:20 (The Holy Scriptures, Jewish Publication Society of America 1955). Biblical citations are to The Holy Scriptures (Jewish Publication Society of America 1955) unless otherwise indicated.

2. *Leviticus* 19:18.

3. Leslie H. Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 *Fordham L. Rev.* 1261 (1998).

4. See Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 *Cath. U. L. Rev.* 331 (1987).

5. Or consider a variation suggested by Professor Russell G. Pearce: The third lawyer says, "I am celebrating the glory of God by aiding in the administration of justice." Would that make you feel more sanguine about being represented by the third lawyer?

My next point can be illustrated through a true story. Several years ago, a friend expressed his disappointment that he could never serve on a jury. At that time, the jury commission where we lived used a questionnaire that asked, among other things, whether the potential juror had moral objections to the death penalty. Anyone answering yes to that question was automatically disqualified from serving. Because my friend believed, as a matter of religious conviction, that human life is sacred and that its preservation is paramount to all other moral values, he responded in the affirmative and was disqualified each time he submitted the questionnaire.

I suggested to my friend that his conduct was inconsistent with his asserted moral priorities. The preservation of human life was not paramount for him—telling the truth to the jury commission was. Because of his scruples about answering the questionnaire truthfully, he had been making it impossible for himself to serve on a jury and, as a juror, to vote against death.

After reflection, my friend decided to lie on the next jury questionnaire. It happens that my friend was a reform rabbi, and his religious beliefs helped him to reach his decision. But not all religious people—in fact, not all religious Jews—would make the same decision. Indeed, I imagine that there are Jews, Protestants, and Catholics (to say nothing of Kantians) who would find lying to a court to be a shocking matter, regardless of the consequentialist justification.⁶ My point is that religion doesn't "answer" such dilemmas—not, at any rate, in a predictable or consistent way.

Moreover, conflicting religious precepts can create dilemmas of conscience⁷ as readily as can conflicting precepts of legal ethics. I recently spoke at a gathering of lawyers and others interested in law and religion. Most of those present were shocked at my argument that a criminal defense lawyer could ethically present perjured testimony.⁸ Their shocked response is hardly surprising: False swearing is condemned by religion as well as by law, lawyers' ethics, and philosophy. Yet, as Professor Griffin notes, all religions also "condemn . . . the breaking of solemn promises."⁹ What, then, is my obligation regarding my client's perjury when I have given him my solemn promise not to divulge what he tells me in confidence? When my client admits to

6. After lying to the jury commission, it would be necessary to lie again in court during *voir dire*.

7. Professor Griffin refers to "dilemmas of the individual attorney's conscience," but I understand her to mean dilemmas between religious morality and legal ethics. See Griffin, *supra* note 3, at 1256.

8. See, e.g., Monroe H. Freedman, *Understanding Lawyers' Ethics* 108-42 (1990) (explaining why it is ethical for a criminal defense lawyer to present perjured testimony) [hereinafter Freedman, *Understanding Lawyers' Ethics*].

9. Griffin, *supra* note 3, at 1279 n.83 and accompanying text (quoting Ronald M. Green, *Religion and Moral Reason: A New Method for Comparative Study* 11 (1988)).

me that he intends to testify falsely about his involvement in the crime, should I present my client's perjury to the court as truthful testimony, or should I tell the judge that my client is lying and thereby break my promise to my client? Religion, like legal ethics, presents the moral dilemma. And, like legal ethics, religion gives no clear answer to that dilemma.¹⁰

Another point: Professor Griffin should be more careful about what she wishes for. "I think," she says, "that philosophical and religious ethics should have equal status in the legal profession."¹¹ That thought conjures up an image of Oliver Twist asking, please, sir, for some more porridge. True, the occasional moral philosopher wanders into the literature of legal ethics, but I challenge anyone to demonstrate a single significant effect that any such moral philosopher has had on any particular issue of legal ethics.

Reluctantly, I have pretty much given up the effort of trying to teach moral philosophy (including discussion of God and of Natural Law) in my legal ethics course. The students' lack of interest is matched only by their almost universal and invincible commitment to cultural relativism. I once spent the better part of a class session trying to identify a single moral precept that the students could agree was universally true, a single horrific act or practice that they could agree was wrong regardless of time and place. Slavery and genocide, sadly enough, are too familiar to jolt them into responding. So, at a time when most people had not yet heard about the horrors of clitoridectomy and infibulation, I described those practices. The students were indeed shocked, but not a single one would condemn the practice as wrong on the part of those people who accept it as part of their custom or religion. As one student explained, "You have to be tolerant."

"At last," I exclaimed in genuine excitement, "a universal principle: One must be tolerant!" And the students readily agreed on that one. So I said to a bright student (the one who had first posited the principle), "Okay, over there in that corner is a man who is about to perform the ritual torture and murder of a baby. And over there, in that corner, is a man who is about to be extremely intolerant of the first man's act. You can stop one of them, but not both. Quick! Which one do you stop?" When she hesitated and then avoided a direct answer, I realized just how hopeless the whole discussion was.

Professor Griffin elaborates her wish by adding, "If utilitarianism and Kantianism, consequentialism and deontology, are becoming

10. The possible ways of dealing with the problem are analyzed in *Understanding Lawyers' Ethics*. Freedman, *Understanding Lawyer's Ethics*, *supra* note 8, at 109-22.

11. Remarks of Professor Leslie Griffin at the Conference, *The Relevance of Religion to a Lawyer's Work*, Fordham University, June 1-3, 1997; *cf.* Griffin, *supra* note 3, at 1254 ("In this essay I argue that the academic discipline of religious studies at least should have equal status in legal ethics with philosophy.").

standard ethical terms for lawyers, then lawyers should learn that the religious ethical traditions are also comprehensible, not merely personal or private accounts of morality."¹² In fact, those terms of moral philosophy are no more "standard ethical terms for lawyers" than they are for health-care managers or professional wrestlers. It is undoubtedly true that for a lawyer who takes both her profession and her religion seriously (in the sense of expressing or fulfilling what is at the core of her self), then, for that lawyer, her religious ethical tradition will inform her professional life and her decisions about legal ethics. But her religious ethical tradition will do so only in what Professor Griffin disparages as a "merely personal or private" account of morality. That is, the lawyer will be applying, in a personal or private way, her understanding of her religious tradition to resolve issues of legal ethics. The alternative—to use religious ethical traditions to decide issues of legal ethics in a *public and communal* way—seems to me to be neither practical nor desirable.

Part of the problem, of course, is the use of the treacherous term "traditions" in this context. Whose traditions and whose formulations and interpretations of those traditions are we to use? For example, Professors Sanford Levinson and Russell Pearce have succeeded in persuading Professor Griffin that there is a serious question whether an observant Jew could be a criminal defense lawyer, or any other kind of lawyer, in the American legal system.¹³ They do this by manipulating the word "tradition," as in "[t]he Jewish tradition's general hostility to an adversarial role."¹⁴

Thus, Professors Levinson and Pearce factitiously establish a Jewish tradition hostile to adversarial lawyering through critical remarks about legal practice by a medieval Jewish scholar and a seventeenth century rabbi,¹⁵ and by the fact that "only in 1960 did the Israeli rabbinate formally accept[] practices permitting legal counsel to argue on behalf of either litigant."¹⁶ Indeed, Professor Pearce asserts this Jewish tradition hostile to adversarial lawyers even while acknowledging that "Jewish courts have permitted lawyers since the

12. *Id.* at 1271.

13. *Id.* at 1256 & n.9.

14. *Id.* (quoting Russell G. Pearce, *The Jewish Lawyer's Question*, 27 Tex. Tech L. Rev. 1259, 1265 (1996)); see also Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 Cardozo L. Rev. 1577, 1607 (1993).

15. Not surprisingly, the quotations are similar to modern criticisms of lawyers, for example: A lawyer is a "legal manipulator . . . concerned less with absolute fidelity to the law than with crafting ostensibly legal arguments that would enable the client to prevail against an adversary." Pearce, *supra* note 14, at 1265 (quoting Levinson, *supra* note 14, at 1598-99). If such quotes prove anything about traditional legal practice, of course, it is that legal practice at the time—which the scholar described as well as decried—was in fact highly adversarial.

16. Pearce, *supra* note 14, at 1265 (internal quotations omitted).

middle ages."¹⁷ Note also the point—ambiguous at best—that the Jewish rabbinate in Israel formally accepted legal counsel to argue in 1960. That was, after all, only twelve years after the founding of Israel, and *before* the Supreme Court of the United States recognized a right to appointed counsel in criminal cases involving imprisonment.¹⁸

By similar reasoning, of course, we can question whether Christian tradition permits an observant Protestant or Catholic to be a lawyer. Who could be a lawyer in the face of the condemnation: "Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers,"¹⁹ and "Woe unto you, lawyers! for ye have taken away the key of knowledge . . ."²⁰ Thus, religious tradition would make non-lawyers of us all.

Finally, I want to correct Professor Griffin's misrepresentation of my position on morality in lawyering. She makes this error in an earlier article in the *Georgetown Journal of Legal Ethics*.²¹ In her present paper, Professor Griffin refers to David Luban for "the dominant view" or "standard conception" of lawyering, in which the lawyer bears no moral responsibility for her representation of a client.²² As

17. *Id.*

18. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

19. *Luke* 11:46 (King James).

20. *Luke* 11:52 (King James).

21. Leslie Griffin, *The Lawyer's Dirty Hands*, 8 *Geo. J. Legal Ethics* 219, 225-27 (1995).

There are other errors of scholarship in that article. For example, referring to my defense of the adversary system, Professor Griffin primarily cites Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (1975). That book, however, simply describes, rather than defends, the adversary system. Professor Griffin makes no reference to my more recent book, *Understanding Lawyers' Ethics*, which includes a thirty-page chapter that explains and defends the adversary system. Freedman, *Understanding Lawyers' Ethics*, *supra* note 8, at 13-42.

Also, Professor Griffin discusses an article that I originally published in 1966. See Griffin, *supra*, at n.36. The article she discusses is *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *Mich. L. Rev.* 1469 (1966). Her only cited source for that article, however, is an anthology published twenty years thereafter. Thus, when she says (correctly) that my analysis in the article is based in part on the ABA's 1908 Canons of Professional Ethics, she makes it appear that I neglected the ABA's 1969 Model Code of Professional Responsibility, which actually was not promulgated until three years after my article had been written. Again, she makes no reference to *Understanding Lawyers' Ethics*, in which I analyzed the same issues in the context of both the Model Code and the Model Rules.

22. Griffin, *supra* note 3, at 1254 & n.2. Professor Griffin relies on David Luban, *Lawyers and Justice: An Ethical Study* (1988), which incorrectly asserts that I support the "dominant picture."

Luban's discussion, however, and even his bibliography, omits any reference to the principal article I have written on that subject. See Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 *Cath. U. L. Rev.* 191 (1978). Ironically, that article originated as the Pope John XXIII Lecture, and is one of the few law review articles that includes citations to religious sources.

stated by Professor Murray Schwartz, who originated the analysis,²³ under the Principles of Professionalism and Nonaccountability, the lawyer is "beyond reproof for acting on behalf of the client" and is totally "immun[e] from [moral] accountability."²⁴ I, however, have repeatedly rejected that view, for example:

Because my own position has been misunderstood in the past, let me reiterate it. Lawyers *are* morally accountable. A lawyer can be "called to account" and is not "beyond reproof" for the decision to accept a particular client or cause. Also, while representing a client, the lawyer should counsel the client regarding the moral aspects of the representation. If a lawyer chooses to represent a client, however, it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights that the client elects to pursue after appropriate counseling.²⁵

Some readers may be surprised to learn that the position expressed in that paragraph—that lawyers are morally accountable for the decision to accept a particular client or cause—is highly controversial. That position has been denounced as "worse than absurd," "dangerous," and "pernicious." A law professor who specializes in ethics (and is deeply committed to his religion) wrote to inform me that "Joe McCarthy would be proud of you."²⁶ Right or wrong, at least those critics are objecting to what I have said, rather than presenting and criticizing a position that I do not hold.

CONCLUSION

Professor Griffin pleads that religious ethics be given equal status with moral philosophy in the legal profession.²⁷ In fact, religious eth-

Also, I have expanded and updated that analysis in chapter three of *Understanding Lawyers' Ethics* ("The Lawyer's Virtue and the Client's Autonomy"), which was published seven years ago. See Freedman, *Understanding Lawyers' Ethics*, *supra* note 8, ch. 3; see also Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 Tex. L. Rev. 111 (1995) [hereinafter Freedman, *Moral Obligation*]; Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 Cath. U. L. Rev. 331 (1987). All but the last of these were published before Professor Griffin's article in the *Georgetown Journal of Legal Ethics*. See Leslie Griffin, *The Lawyer's Dirty Hands*, 8 Geo. J. Legal Ethics 219 (1995).

23. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669 (1978); Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *The Good Lawyer* 151 (David Luban ed., 1984) [hereinafter Schwartz, *Zeal of the Civil Advocate*].

24. Schwartz, *Zeal of the Civil Advocate*, *supra* note 23, at 151.

25. Freedman, *Understanding Lawyers' Ethics*, *supra* note 8, at 71 (citing David Luban, *Lawyers and Justice* (1988)); see also citations *supra* note 22.

26. See Freedman, *Moral Obligation*, *supra* note 22, at 115 n.20; Monroe Freedman, *The Morality of Lawyering*, Legal Times, Sept. 20, 1993, at 22; see also Monroe Freedman, *Must You Be the Devil's Advocate?*, Legal Times, Aug. 23, 1993, at 19 (discussing whether a lawyer should represent a client or position that the lawyer finds morally objectionable).

27. Running through Professor Griffin's paper is the assumption that legal ethics needs religion because the legal profession is in serious and unprecedented trouble.

ics already has equal status with philosophy, which is to say, virtually none.

And that is probably a good thing. Yes, I like to think that my religion informs and enriches my professional life,²⁸ just as it informs and enriches my life in general. Also, I accept the possibility—but only the possibility—that people who are religious are better people than they would otherwise be.²⁹ But among Jews—just as among Christians—there is so much disagreement about what constitutes “tradition” and “ethics” that I am skeptical about how useful it would be for the organized Bar to attempt to apply anything called “religious ethics” to the essentially public endeavor of fashioning and enforcing rules of professional conduct for lawyers. Better, I think, for religion to remain what Professor Griffin denigratingly calls “merely personal or private accounts of morality.”³⁰

Griffin, *supra* note 3, at 1264 & n.27, 1267. She apparently gets that idea from such fatuous works as Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993). *But see* Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 Wm. & Mary L. Rev. 145, 184-85, 193-97 (1996) (providing devastating commentary on Dean Kronman's book); Monroe Freedman, *The Good Old Days, for Good Old Boys*, *Legal Times*, Feb. 28, 1994, at 31 (arguing that the legal profession's idealized past, to which some commentators yearn to return, was not all that ideal).

28. *See* Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 Tex. Tech L. Rev. 1131 (1996) (*N.B.* the indefinite article in the title).

29. Professor Griffin assumes that religious commitment can only make a positive contribution. Griffin, *supra* note 3, at 1257-58. The unhappy fact is that deep religious commitment is also a characteristic of Ayatollahs, Grand Inquisitors, and a prophet who hacked a chained prisoner into pieces.

30. *Id.* at 1271.

Notes & Observations