

1998

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Thomas D. Morgan

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Recommended Citation

Thomas D. Morgan, *The Relevance of Religion to a Lawyer's Work - Legal Ethics: A Response to Professor Griffin*, 66 Fordham L. Rev. 1313 (1998).

Available at: <https://ir.lawnet.fordham.edu/flr/vol66/iss4/23>

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THE RELEVANCE OF RELIGION TO A LAWYER'S WORK—LEGAL ETHICS: A RESPONSE TO PROFESSOR GRIFFIN

Thomas D. Morgan*

PROFESSOR Leslie Griffin concludes her thoughtful article in this Symposium on a positive note: "We should not underestimate or denigrate religion's role in encouraging individuals to be good lawyers."¹ On the way to that conclusion, she draws upon her training in religious studies to draw two distinctions that contribute in an important way to understanding the relation between religious insights and legal ethics. Unfortunately, however, I believe she denigrates the study of legal ethics in a way that only distracts from her argument, and she leaves one of her potentially most important insights virtually undiscussed.

Professor Griffin's first important distinction is the one she draws between "theology" and "religious studies" as sources of insight about legal ethics. As she describes the distinction, "[t]heology is reflection within a [religious] tradition"² while religious studies is a secular task of "religious people attempting to address a secular, or at least an alien, world."³ Although someone outside the religious studies community might quibble with the claim that "religious" best describes a secular study of anything, Professor Griffin is surely right that a basic distinction can be drawn between particular lawyers' personal beliefs based upon "theology" and the development of common standards applicable to all lawyers that are better left to "religious studies."⁴

The next step in Professor Griffin's analysis, however, is less obvious. "Attorneys have good reason to oppose a legal ethics in which the standards are set by the theological convictions of religious lawyers," she asserts.⁵ "[L]aw and politics are the realms of common ground in which people 'agree to disagree' about their theological commitments. Like the state, the legal profession cannot be guided by

* Oppenheim Professor of Antitrust and Trade Regulation Law, The George Washington University Law School.

1. Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 *Fordham L. Rev.* 1253, 1281 (1998).

2. *Id.* at 1268.

3. *Id.* at 1269 (quoting Jacob Neusner, *Judaism Within the Disciplines of Religions Studies: Perspectives on Graduate Education*, in *New Humanities and Academic Disciplines* 46, 49 (Jacob Neusner ed., 1984)).

4. By the close of her article, Professor Griffin is unwilling to make the distinction even this sharp. "Religious as well as philosophical comprehensive doctrines that encourage people to be good lawyers are an important part of legal ethics. Such comprehensive doctrines need not be privatized." *Id.* at 1281.

5. *Id.* at 1262.

particular norms, but must be ruled by norms and reasons that everyone can share."⁶

At the very least, Professor Griffin's concern is excessive. As someone who lives in Washington and watches a lot of lawmaking, I can say that I know of few laws based on any principles "everyone can share." All legislators must answer to the voters at the next election, but beyond that, their sources of insight are diverse and often individual. Surely none should be condemned for choosing to base a vote in part on what they understand to be eternal truths, and lawyers participating in debates about professional standards should be as free as anyone else to bring the insights of their religious traditions to bear on the positions they take in the debate.

Ultimately, even Professor Griffin seems to agree. If individual lawyers participating in the debate over general standards meet John Rawls' "public reason proviso,"⁷ she acknowledges that:

recourse to lawyers' [theological] doctrines is appropriate—if it can enhance the ideal of public reason, which is, in legal ethics, the law, canons, rules, and codes that govern the profession. Perhaps our declining professionalism can be halted if lawyers voice the reasons that lead them to respect the law and its obligations. . . . In professional *education*, there should also be room for analysis of comprehensive doctrines. Moreover, *in some circumstances*, appeal to comprehensive doctrines may be appropriate for the setting of the profession's norms.⁸

She is right to grant theology at least this much room. For example, at their best, standards of legal ethics consistently call lawyers to the standard of conduct required of a fiduciary. While "fiduciary" is a term with secular meaning, it is not too great a stretch to see fiduciary status as consistent with the image of servanthood to which many religious lawyers find themselves called. Theological traditions and legal ethics need not be adversaries. Theological traditions as well as general religious insights can motivate lawyers to make the rules governing lawyer conduct better rules.

Indeed, perhaps the best illustration of this comes from an exemplar upon which Professor Griffin herself relies. Professor Monroe Freedman is probably most commonly known as a principal defender of the "standard conception"⁹ with which Professor Griffin contrasts philo-

6. *Id.* (footnote omitted).

7. Quoting Rawls, she says that "reasonable such doctrines may be introduced in public reason *at any time*, provided that *in due course* public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support." *Id.* at 1267 (quoting John Rawls, *Political Liberalism* li-lii (1996) (emphasis added)).

8. *Id.* at 1267-68.

9. The most comprehensive statement of his views is in Monroe H. Freedman, *Understanding Lawyers' Ethics* (1990). The article that originally defined his views

sophical and religious thought.¹⁰ Professor Freedman, however, has also made it known that his views are deeply influenced by his Jewish faith, including the value that his faith places on preservation of human life.¹¹

When Proposed Final Draft No. 1 of the Restatement of the Law Governing Lawyers was before the American Law Institute ("ALI") membership in May, 1996, Professor Freedman condemned the text of § 117A for not going far enough to permit lawyers to disclose information necessary to prevent the loss of innocent life.¹² In a moving speech, he persuaded the ALI membership to restate the law in the form of a provision giving lawyers broad license to disclose under circumstances going beyond any current professional standards.¹³

I believe a source of Professor Freedman's motivation was theological, and while I do not recall him making an explicit appeal to Jewish tradition, I do not understand his failure to do so to have been other than a rhetorical choice.¹⁴ Professor Freedman's conduct helps illustrate what it means to integrate faith and the development of professional ethics and helps illustrate why I affirm Professor Griffin's ultimate acknowledgment of that link.

The second major contribution of Professor Griffin's article is her analysis of how the law should deal with a lawyer who, out of religious conviction, violates one of the legal norms governing lawyers. "What room, if any," she asks, "should the profession make for religious dissenters in its disciplinary proceedings?"¹⁵ That question, of course, does not inherently imply a tension between a religious and a non-religious approach to legal ethics. It is a part of a more general tension between the public consensus about how a lawyer should behave

for most people is Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

10. Griffin, *supra* note 1, at 1254.

11. See Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 Tex. Tech L. Rev. 1131 (1996). Earlier, Professor Freedman had discussed a religious source of his ethical beliefs in commenting on the work of Professor Thomas Shaffer. See Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 Cath. U. L. Rev. 331 (1987).

12. A published form of Professor Freedman's criticism is found in Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be*, 29 Loy. L.A. L. Rev. 1631 (1996).

13. See Restatement of the Law (Third): The Law Governing Lawyers § 117A(1) (Council Draft No. 13, 1997) ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes such use or disclosure is necessary to prevent death or serious bodily injury to a person."). This provision would permit disclosure of information that a person other than the client was about to kill a third person, for example, a category of disclosure not explicitly permitted under either the ABA Model Code or Model Rules.

14. In short, Professor Freedman's conduct exemplifies Professor Griffin's call to "translate" theological convictions into "the language of public reason." Griffin, *supra* note 1, at 1263.

15. *Id.* at 1259.

and any private belief a lawyer might have that the required behavior would be immoral.¹⁶

That tension, in turn, is not limited to legal ethics; it is a potential issue for any person dealing with the legal requirements of the society in which the person lives. At one time, for example, it was illegal for a white college in Georgia to admit non-white students. Similarly, it was as illegal for a white person to sit in the back of the bus as for a non-white person to sit in the front. Every day, individuals confronted moral choices about when the legal requirement was trumped by the moral requirement of treating others with equality and dignity.

Daily, lawyers also make ethical judgments that are morally-based rather than rule-based. They refrain from impeaching a witness by suggesting a fact that they know is untrue but whose falsity would be hard for the witness to prove. They refuse to take cases pursuing ends they believe unjust. They try to comply with the legal rules governing the practice of law, but call upon philosophical and religious understandings to deal with countless situations where the motivation of rules alone will not suffice. Indeed, the paradigm examples of conflict may in fact tend to trivialize the place of religious belief in ordinary legal practice. The real theological questions for lawyers arise in what Professor Griffin calls "the ordinary tasks of professional life"—as the lawyer decides what kinds of cases to take, what kinds of clients to serve, and the integrity with which he or she will conduct his or her practice.¹⁷ Those questions are a lot harder for most of us to write about than are dramatic dilemmas, but they are the essence of the issues considered in this Symposium.¹⁸

But Professor Griffin is surely right that at times the demands of religious faith and the demands of the law may conflict. One example

16. I, of course, acknowledge that my account may seem to minimize the tension many lawyers feel between their religious calling and the demands of being a lawyer. For a recent attempt to wrestle with this tension, see Joseph G. Allegretti, *The Lawyer's Calling: Christian Faith and Legal Practice* (1996).

17. Professor Griffin acknowledges as much: "[R]eligious convictions will affect the choices that lawyers make about their professional lives. For example, religion will influence some to spend their legal careers in service of the poor and others to resist the material pressures of the profession or certain demands by their clients." Griffin, *supra* note 1, at 1257 (footnote omitted). Some persons, she adds, might even decide not to become lawyers for religious reasons. *Id.* at 1256.

18. Again, Professor Griffin acknowledges as much:

Let us not over-dramatize theology's role in the moral life of the lawyer; we need not think that believers spend all their time offending other lawyers or trying to translate their theological convictions. The daily life of the religious lawyer is not a series of dramatic conflicts between theological/ethical and legal/ethical standards, and thus a process of constant confrontation and translation. Instead, religion may give lawyers reason to go about the ordinary tasks of professional life and to conduct themselves as professionals. Bracketing such sources of moral conduct or excluding them because they are theological would indeed undermine a professional ethics.

Id. at 1265-66.

might be that of the lawyer who knows her client has committed a murder for which another person is to be executed.¹⁹ The dilemma is classic: Should the lawyer honor her legal duty to protect the client's confidential disclosures or should she violate the law to save an innocent person's life? To Professor Griffin, a lawyer's answer might be theologically-based. Roman Catholicism might favor confidentiality by analogizing the lawyer-client to the priest-penitent relationship, while Jewish tradition might dictate disclosure to protect innocent human life.²⁰

I acknowledge the difficulty persons face in such dilemmas²¹ and I share Professor Griffin's view that a civil disobedience analysis rather than a religious exemption should be employed in assessing any sanction for the choice made.²² Her analysis is both sensitive to the legitimacy of religious dissent and the community values represented by law. Carving out religious exemptions from professional norms would be both administratively difficult and confusing to clients and third parties whom the rules are often thought to protect. Civil disobedience—in which the lawyer violates the rule but bears the legal sanction for doing so—is surely the correct approach.

Given the quality of her article, then, it is sad that Professor Griffin inexplicably begins her article by picking a fight with a straw figure labeled "legal ethics." "Simplistic" is the most charitable word one might use to describe her caricature of the distinction between religious ethics and legal ethics:

Religious and theological ethics examine how persons live their entire lives, the kind of persons they become, the nature of their moral choices. Legal ethics, however, is much more circumscribed. Its core is in codes and rules; it is a technical subject in which one learns, for example, the intricacies of conflicts and of reasonable fees; it is tested on multiple choice exams.²³

If the object of this criticism were the multistate professional responsibility examination as we have known it until recently, I would certainly agree with Professor Griffin. The emphasis in that widely-used, multiple-choice bar examination on the parsing of a limited number of

19. This was the subject of the Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 Loy. L.A. L. Rev. 1543 (1996), some of whose articles Professor Griffin cites.

20. See generally Griffin, *supra* note 1, at 1277-78 (presenting a hypothetical Roman Catholic law professor and discussing how her religious beliefs and understandings may affect her professional life). I acknowledge that I may be reading too much into Professor Griffin's conclusions about what particular religious traditions seem to require. Her distinctions in this portion of her article are often hypothetical.

21. Professor Robert Tuttle and I have written about similar issues dealing with whether a lawyer may properly counsel a client who is seeking to pursue lawful but seemingly immoral purposes. See, e.g., Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 Geo. Wash. L. Rev. 984 (1995).

22. See Griffin, *supra* note 1, at 1260-61.

23. *Id.* at 1253.

particular rules may well have distracted law students from what the subject of legal ethics really is.²⁴

Most legal ethics teachers with whom I have worked over the last twenty years, however, see their field as far closer to the objects of philosophical, theological, and religious ethics that occupy most of Professor Griffin's article.²⁵ Although Professor Griffin implicitly acknowledges that work throughout her article, at least at the outset, she somehow felt it necessary to dismiss such work as the study of "broader questions of professional responsibility" and thus somehow "non-standard" in the study of legal ethics.²⁶

On this point, Professor Griffin is simply wrong. There may be some inevitable tension between the work of philosophers, theologians, and religious ethicists who deal with moral questions at an abstract level and scholars or lawyers who try to wrestle with concrete problems, but beyond that, I believe Professor Griffin's caricature of legal ethics study only distracts the reader from the important contributions of her article.

Finally, perhaps the most disappointing part of Professor Griffin's article is her failure to take up her own idea at the outset of the article and analyze what contribution, if any, legal ethics principles may have

24. The Multistate Professional Responsibility Examination (MPRE) is a product of the National Conference of Bar Examiners (NCBE) and is used in a large majority of American jurisdictions to determine whether bar applicants know the legal rules governing their professional conduct. Since the mid-1980s, for an answer on the examination to be correct, it must be correct under both the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct. Because only a discrete number of propositions are true under both standards, preparation for the MPRE typically was narrowly-focused. And I would agree that enough students are concerned about bar passage that many broader ethical issues considered by professors in legal ethics classes may have been studied less intensely than they should have been. In 1997, however, the NCBE announced that the MPRE would abandon its focus on a narrow set of rules and instead address a broad range of legal issues facing lawyers. I believe this development will make it far easier for professors to have their students' attention when they address the kinds of questions with which Professor Griffin is appropriately concerned.

25. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 Wis. L. Rev. 1529, is not to the contrary. Although it is sometimes cited as a critique of any philosophical contribution to legal ethics, it is more accurately seen as a criticism of analysis by philosophers who do not understand the phenomena they are analyzing or the context in which lawyers often find themselves.

26. Griffin, *supra* note 1, at 1253-54. Professor Griffin's argument in effect plays a verbal trick in that she relies on the term "standard conception," which she attributes to David Luban in his book *Lawyers and Justice: An Ethical Study* (1988). See Griffin, *supra* note 1, at 1254 n.2. In fact, Luban's phrase is simply one he applies to the principles of partisanship and nonaccountability in Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669 (1978). Professors Schwartz and Luban, in turn, were not using the "standard conception" idea as generally as Professor Griffin does. The Schwartz article principally applied the "standard conception" to the work of litigators, not all lawyers, and Professor Schwartz later tried to limit its appropriate use to criminal lawyers. See Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 Am. B. Found. Research J. 543.

for religious studies or the conduct of the religious believer. I believe that, in at least two senses, at the intersection of law and religion, the traffic does "run both ways."²⁷

First, in significant part, the content of legal ethics rules represents the moral judgments of thoughtful lawyers and judges over many years. While the lack of disinterest of such rulemakers is reflected in many of the rules,²⁸ the rules also embody a world of experience that should enrich the analysis of any religious person who genuinely wants to understand the many considerations involved in a serious moral judgment about a lawyer's conduct.

Second, while it is tempting to believe that religious people will consistently make wise ethical judgments on their own, such a hope is naive. Decision making under conditions of pressure and uncertainty is hard for anyone. Legal ethics rules can provide a source of strength for even religious lawyers to begin to take hold of a complex situation and avoid the human temptation to think they are wiser than they really are. Legal ethics rules thus bring to the discussion of religious ethics both a starting point for analysis of a given situation and a checklist of issues essential to consider before making a final decision. They may not always be decisive in the decision of the religious lawyer, but they are both authoritative rules of law and a potential source of moral insight.²⁹

In short, I believe Professor Griffin's article provides a rich and well-argued account of both important sources of ethical insight and the right way to handle conscientious dissent from professional standards. I only wish she were less grudging in her acknowledgment of the positive role of legal ethics and legal ethicists in contributing to lawyers' sound decisions.

27. Relying on an image from James Gustafson, Professor Griffin writes: "The assigned topic of *legal*-instead of *general*-ethics . . . suggests that at the intersection of law and religion the traffic travels one way" and that "theology and ethics cannot be substantially altered by law." Griffin, *supra* note 1, at 1253 (quoting James M. Gustafson, *Intersections: Science, Technology, and Ethics* 136 (1996)).

28. I certainly agree with Professor Griffin's complaint that many rules of legal ethics have been driven by self interest. See Griffin, *supra* note 1, at 1274. Indeed, I have so argued elsewhere. See, e.g., Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702 (1977).

29. In Morgan & Tuttle, *supra* note 21, at 1000-01, we call the rules *prima facie* authoritative for the lawyer. See also Schneyer, *supra* note 25, at 1532 ("[L]egal ethics, with its emphasis on concrete roles and relationships, presently has more to teach moral philosophy as a general field than moral philosophy can teach legal ethics.").

Notes & Observations