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ESSAY

ON RELIGIOUS LEGAL ETHICS

THOMAS L. SHAFFER*

Perhaps as a result of the new and populous generation of lawyers, or as a holdover from the anti-war generation of law students, or maybe even as fall-out from Watergate, legal ethics has become a serious discipline.¹

Legal ethics has become a new and impressive mansion—a mansion with many rooms. It contains a rather opulent ground-floor room for the American Bar Association project on professionalism, along with a smaller, second-floor room for state bar association projects of a similar sort, with a stately balcony for projects on civility.² There is a dusty but capacious library for the academics who are making legal ethics their principal interest. Most of these academics are young, and in one way or another are influenced by Immanuel Kant and the elsewhere discredited influence of the Enlightenment on the broad American academic discipline of ethics.³ There are spare, rather Calvinistic rooms at the rear of the mansion for the practicing attorneys who operate the disciplinary

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¹ See THOMAS L. SHAFFER & MARY SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* ch. 1 (1991) (discussing teaching of ethics in American law schools).

² See Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 *GONZ. L. REV.* 393, 393-413 (1990-1991).

³ See generally, JOHN MCGOWAN, *POSTMODERNISM AND ITS CRITICS* (1991). Scholars in both jurisprudence and philosophy outside the law use the term "postmodern" to describe what happened to Kant and the Enlightenment. *Id.* at 31. I take the word to mean that it is not Christians and Jews who did the discrediting, although we tried. In fact, many of us are happy to take advantage of a world that has somehow embraced a state beyond merely "modern."

process maintained by state courts of last resort. These rooms all have one-way doors leading to an alley.

The room I use is in the attic. It is small and easy to ignore. It looks like a closet that has been converted into a shrine, with enough space for an altar with one candle and a bouquet of flowers. It is the room devoted to *religious* legal ethics. Those who use it tend to do so one at a time.

Religious legal ethics maintains a room of its own through the influence of two powerful patrons—the first being the lawyers in the mansion's other rooms who consult the religious tradition, or who occasionally want to put forth the appearance that they consult it. The second source of patronage is a much older and even larger mansion down the street, filled with people who work in academic disciplines labeled “religious,” including religious ethics.⁴

Each of these two sources of patronage for religious legal ethics is vast and fairly potent. Consider, first, lawyers and professors whose work embraces legal ethics and who want to have a small, unobtrusive part of their new edifice consecrated to religion. *Most* of these individuals believe that it is important to have the religious tradition taken into account. Although they may not allow religion to influence their actions, most of them claim belief in God,⁵ even belief in miracles,⁶ even belief in Judgment Day⁷—the Eschaton: Death, Judgment, Heaven, Hell! Most of them go to religious services.⁸ Eight out of ten report that they have experienced the presence of God in their lives.⁹ Most claim membership in a religious association.¹⁰ Many sing in choirs.

But these lawyer-patrons do not seem to find religion either politically or intellectually interesting. They summon those of us who “do” religious ethics from our attic room, and sometimes from the mansion down the street, as if they were townspeople in movies about the Old

⁴ I am going to avoid the taint of denominational Catholicism and avoid the Catholic label for this discipline—“moral theology.” See, e.g., MORAL THEOLOGY: CHALLENGES FOR THE FUTURE: ESSAYS IN HONOR OF RICHARD A. McCORMICK (Charles E. Curran ed., 1990). I am also going to avoid the corresponding taint from the Protestant tradition by not calling it “theological ethics.” See, e.g., HELMUT THELICK, THEOLOGICAL ETHICS (William H. Lazareth ed., 1979). Jews call it “law.” See, e.g., MICHAEL WYSCHOGROD, THE BODY OF FAITH: JUDAISM AS CORPOREAL ELECTION 198 (1983) (referring to the “ethical law”). I confine my claim of knowledge on the subject to the religious ethics of Jews and Christians.

⁵ GEORGE GALLUP, JR. & JIM CASTELLI, THE PEOPLE'S RELIGION (1989). “Nine out of ten Americans say they have never doubted the existence of God . . .” *Id.* at 56.

⁶ *Id.* at 58. “Eighty-two percent of those surveyed agreed that ‘even today, miracles are performed by the power of God.’” *Id.*

⁷ *Id.* at 56. Eight in ten of those surveyed believe they will face God at Judgment Day. *Id.*

⁸ *Id.* at 31. A 1986 survey found that 42% of Americans had attended church within the past week, while 49% had attended on Easter Sunday. *Id.*

⁹ *Id.* at 58.

¹⁰ GALLUP & CASTELLI, *supra* note 5, at 29. Sixty-five percent of those surveyed said they were members of a church or synagogue in 1988. *Id.*

West—as if someone had lost a gunfight and was about to be buried and the townspeople sent for the parson. There are occasions, especially when someone is being buried, when it is comforting to have a parson say a few religious words in public.

The other source of patronage for religious legal ethics is the old mansion down the street—academic religion. That mansion houses a busy, healthy enterprise. It has large ground-floor rooms for professionals in publishing, religious education, the clergy, and those who educate such people in university professional schools. It has even larger and grander rooms for the thousands of professors who teach undergraduate, graduate, and professional courses in theology, ethics, religion, Jewish law, social science, and the humanities. Law teachers seem not to know it, but there are many more full-time scholars in higher education who devote their attention to religion than there are who devote their attention to the law.¹¹ The mansion of religious ethics does not begin to hold them all, but it is a big house and it is full.

The mansion of academic religion has second-floor rooms for representatives of denominational religion who maintain and regulate seminaries and divinity schools where religious ethics is taught and pondered. Of course, it also has professional associations and certification processes that are analogous to those tended in the legal-ethics mansion. One of the first things any mansion devoted to either religion or the law *must* do is to decide whom it is going to keep out.

The keepers of the mansion of academic religion do not keep out attorneys, but they do not pay much attention to them either. Those who earn their bread with religious ethics seem to admit that law might have something to do with religious ethics, and vice versa, but they prefer entertaining such a possibility outside the mansion. I find that many people in that mansion are very generous in helping me learn from them. However, they distrust the law itself somewhat, and distrust those who practice and teach law even more. When the keepers of the mansion take up a legal-ethics question among themselves, as they occasionally do, they are usually cynical about whether being righteous, in a religious sense,¹² has anything to do with being an attorney.

It may be fair to say that people in the mansion of academic religion are not very interested in the law. However, I suspect they are afraid of the law, rather than disinterested in it. Perhaps they are afraid that the worlds of power in which lawyers work will not be interested in *them*. William H. Willimon, a teacher of ministers, indicates this fear when he says, "Today's church resembles nothing so much as a poor palsied nurse

¹¹ See Lisa Green Markoff, *Hispanic Hit List*, THE NAT'L L.J., Nov. 6, 1989, at 4.

¹² See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1956 (1986). In this essay, "righteous" refers to "[c]onforming to the standard of the divine." *Id.*

beside the culture's deathbed, mumbling words of comfort as the society disintegrates."¹³ One would think that those who claim access to the Ruler of the Universe would not despair so much about appellate judges and fourteen-inch paper. But they do.

The literal insignificance of the sub-discipline that I am calling religious legal ethics gives no hint of how vast and how potent its patrons are. That is odd, and is worth thinking about, because it means that something is wrong with the patrons. Religious legal ethics being supported by lawyer-patrons and academic-patrons is like biblical Israel being protected from Assyria by the Egyptians and from Egypt by the Assyrians. It can also be compared to the situation of the Lutheran missionary described by Garrison Keillor who was sent alone to convert Vienna to the Christian faith. The Catholics of Vienna fed him well, but he did not get much encouragement from them. The American Lutherans sent him his tiny missionary paycheck, but little other help.

In any case, I am one of those who uses the attic room with the candle and the bouquet of flowers. I tend, along with a few others, to contemplate moral propositions and quandaries involving lawyers *from* that little room. For those who adhere seriously to their religious heritage, who include *most of the attorneys in America*, I suggest that the best way to be a lawyer and righteous at the same time is to practice law as a ministry—a religious ministry—what we old-fashioned Roman Catholics call an *apostolate*¹⁴ and what Deitrich Bonhoeffer called *radical discipleship*.¹⁵ I want to suggest that a believer's work in the law is following the Lord, being a proclaimer of the Kingdom of God, and, therefore, a minister in the Kingdom.

I do not know enough to be useful to you about being a good person and a lawyer from any other perspective. I have thought about other perspectives, including most of those pursued by my housemates in the mansion of legal ethics, and I find them useless. Some are incoherent. Others are unpersuasive. Some are both.¹⁶ I find some of these perspec-

¹³ WILLIAM H. WILLIMON, *PECULIAR SPEECH: PREACHING TO THE BAPTIZED* 99 (1992).

¹⁴ See LEO RICHARD WARD, *THE AMERICAN APOSTOLATE* (1952).

¹⁵ See E. Clinton Gardner, *Eschatological Ethics* in JAMES F. CHILDRESS & JOHN MACQUARRIE, *THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS* 201-04 (1986); Edward Leroy Long, Jr., *Modern Protestant Ethics*, CHILDRESS & MACQUARRIE, *supra*, at 383-88. Cf. VERNARD ELLER, *KIERKEGAARD AND RADICAL DISCIPLESHIP: A NEW PERSPECTIVE* (1968).

¹⁶ [A]n important characteristic of the twentieth century is that there is no generally agreed upon ultimate principle, body of knowledge, or power . . . to which all of us ought appeal in settling disputes among competing goods to determine which is correct [O]ur only recourse . . . is to appeal to procedural justice to decide whether our view . . . is too narrow or the proposed good is unjust. The flourishing of competing goods refereed by procedural justice is an instance of an open, pluralistic society. Tom Buford, *THE CRESSET* (Valparaiso University), June 1992, at 10 (teacher of religious ethics at Furnam University).

tives interesting, in the same way that I find major league baseball interesting. But I have not found any other perspective in the other rooms of the mansion that helps me complete my mission—to talk and write about being righteous while being an attorney. I accomplish this in the same way I learned about existing in the world when I grew up in the First Baptist Church in my hometown, Fruita, Colorado. Although I know much more now than I did then, I do not know anything better. Therefore, those of us who use the little room in the attic address the practice of law as ministry.

My purpose here is to claim legitimacy for religious legal ethics by arguing that *most* American attorneys should ignore most of what my colleagues in the mansion say about legal ethics, and should regard official “ethics” rules for attorneys the way they regard the motor vehicle code—as an administrative regulation having very little to do with being righteous and an attorney simultaneously. This entails, as I have tried to demonstrate elsewhere,¹⁷ turning to fellow believers in church, temple, and synagogue for moral guidance, and turning to the Bible and our traditions for the professional moral heritage of Jews and Christians.

* * *

A troublesome question arises when viewing the practice of law as ministry, and I want to discuss it. Some of my friends in religious legal ethics ask: Would it not be better to be as *pluralistic* as you can, even when you are in the little room?¹⁸ Would it not be better to appeal to the ethical sensibilities of as many listeners as you possibly can? And to avoid the “sectarian” content of what you say as often as you can? Some of my friends in legal ethics ask me why I refer to being a Christian and a lawyer, rather than being a good person and a lawyer, when I address religious legal ethics.¹⁹ Some believe this approach draws unnecessary lines.

¹⁷ See *The Church and the Law* in Festschrift in Memory of William Stringfellow (Andrew W. McThenia, Jr., ed., forthcoming); Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 *STAN. L. REV.* 1859 (1993); Shaffer & Shaffer, *supra* note 1, ch. 8; Thomas L. Shaffer, *The Tension Between Law in America and the Religious Tradition* in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 28-53 (Richard John Neuhaus ed., 1989). See also Robert E. Rodes, Jr. & Thomas L. Shaffer, *A Christian Theology for Roman Catholic Law Schools*, 14 *U. DAYTON L. REV.* 5 (1988).

¹⁸ Philip Gleason, *Speaking of Diversity: Language and Ethnicity in Twentieth-Century America* 256-57 (1992). The author suggests another way to look at this—that pluralism in American ideology is a religion of its own. *Id.* That would indicate more serious grounds for resistance than those I suggest here. See THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS*, ch. 6 (1987).

¹⁹ See THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981) (the author's first book on legal ethics). I later regretted not having taken more careful account—certainly in the title, as well as in much of the text—of Jews. Yet, to also include Jews is not the same

I guess the most honest response, as I hope always to be open, has to do with what has happened to the Church in America.²⁰ It is like Prohibition: Even if I were passionate on the evils of rum, which I am not, I would not favor the re-institution of Prohibition because I have learned from the past.

Most of the ethical energy of American Christians has been spent on trying to make America work—on making a religion out of liberal democracy and a liturgy out of American political and legal processes. I find that this has not worked out very well. I doubt, then, that we can talk together about being a good person and a lawyer as something specifically American. After centuries of effort by Christians to have America itself be a communal instrument of moral reasoning, we are further from coherence than ever. Americans do not have a common idea of what a good person is. Our common ethic is not an ethic at all; it is the insertion of a referee in a game in which the only rule is that every person is his own tyrant. My neighbors in the mansion of legal ethics often talk about “values.” This is similar to the time Charles Van Doren wrote something about “values” and showed it to his brother Mark, who said, “Don’t say ‘values.’ Say what you mean.”²¹

As an American and a Christian, I have only one idea in which I am confident, and that is the one I smuggle in and out of that little room in the mansion. It is a religious idea, which entails following the Lord who says to the nation of priests, “Be holy as I am holy.”²²

Most of the discussion I hear concerning legal ethics—which has, in the last two decades, built this mansion and established an elaborate and complex discipline to pursue in the mansion—is that a good person is one who is free to choose whatever he or she wants. If there are moral restraints on the choices people make, and the restraints are beneficial, they seem to be systemic restraints that are necessary to processes that protect each person’s freedom of choice. To be good in this sense is to serve these processes, as both citizens and as attorneys.

The old civil-religious notion that America was God’s New Israel, a city on a hill or a righteous empire, seemed to give our civic and political culture a direction. I do not think it actually gave a direction, or at least not a direction that was not evil; but it seemed to. In any case, goodness as choice does not give us somewhere to go; in fact, suggesting any *goal* or any notion of *common good* in our society is condemned as a limitation

as talking about “good persons” generally; my conclusion, at least in ethics, is that Jews and Christians share a communal, commissioned, and infallible tradition.

²⁰ I think it has also happened to much of Judaism in America, but since I am not Jewish, it is surely best to let Jewish people speak for themselves on this point.

²¹ MARK VAN DOREN, *THE AUTOBIOGRAPHY OF MARK VAN DOREN* (Greenwood Press 1968) (1958).

²² *Leviticus* 11:45.

on freedom of choice. So I am not able to arrive at a pluralistic answer to the question of whether a good person can be a lawyer because, to complete the circle, I am not allowed to think that a good person is one who has a goal or purpose in life which he can insist be respected for what it is, rather than just because he chose it.

The immediate answer to this difficulty, which admittedly worries me, is that I return to my little room in the attic because none of the other rooms make as much sense as my room does. From there, I bring what I bring to the sub-discipline of legal ethics as I find it. I think the most truthful approach is to leave the labels in place.

Of course I have *evangelical* reasons for doing that. Law as ministry is law as a way to follow a Lord who claims to be, Who—I must tell you—is the Ruler of the Universe. That is a political and legal claim. It would be best for you to recognize the claim, if you have not already done so. If you have already recognized the claim—as most of you have—I want you to ponder the significance of such a claim for legal ethics.

I had a student in a large professional responsibility section at Washington and Lee University who stopped me in the hall after class one day and said, “Hey, you’re trying to *influence* these people, aren’t you?” Well, sure

