Commentary: Clergy Confidentiality—A Response to Griffith and Young

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Griffith and Young[1] make two related points in their well-written paper: one empirical and one legal. Their empirical claim is that typical counseling relationships, including religious counseling relationships, are characterized by an expectation of privacy. In their words, "there is a basic societal expectation that clergy will respect the confidence of their charges." Griffith and Young see this expectation as analogous to the more secular relationship between "psychiatrists and other mental health professionals [and] their patients." The second, legal claim, more implicit than explicit, is that judicial enforcement of Griffith's and Young's alleged expectation of confidentiality would not run afoul of American constitutional standards. Griffith and Young assert that "the rabbis may not cavalierly assert that their religious obligation trumps the secular responsibility. . .to preserve confidentiality. Their assertion must pass the test of reasonable common sense." As such, secular courts should be able to hold members of the clergy liable for breaches of confidentiality.

I disagree with both of these claims—the empirical as well as the legal—and shall detail my objections in this article. First, however, I want to note what aspects of Griffith's and Young's paper I do not disagree with. Specifically, Griffith and Young note that the courts that heard *Lightman v. Flaum*[2] neglected to clarify the factual situation before them. It is asserted that the courts did not examine whether the presence of a third party in the meetings between the rabbis and Mrs. Lightman negated any possible confidentiality, that the courts did not clarify whether the rabbis had divulged information to persons other than Mrs. Lightman's husband, and that it was never made clear whether Mrs. Lightman's husband already knew that she was failing to attend the ritual baths. Indeed, the factual picture remained muddled throughout litigation. These points, however, are relevant only to the specific case of *Lightman v. Flaum*—they do not affect the more general empirical and legal arguments made by Griffith and Young. Had these issues not existed, Griffith and Young would still be trumpeting the "basic societal expectation" of confidentiality and discounting the constitutional problems inherent to the enforcement of that expectation. It is these latter, more fundamental, arguments with which I take issue, and it is to them that I shall now turn.

First, I will address the empirical argument. Griffith and Young compare the religious relationship between the clergy and their charges to the more secular psychiatrist-client relationship. Both relationships, claim Griffith and Young, are characterized by an expectation of confidentiality on the part of the party receiving care. I assert that this comparison is problematic. Note the language I have used—and indeed the language used by Griffith and Young themselves—psychiatrists have "clients," but clergy have "charges." "Clients" may expect their service-provider to be responsible to the client only—that is, he or she, as a fiduciary, will cater to their needs and will not serve external values or authorities. Indeed, physicians, psychiatrists, and attorneys are often described as having "fiduciary responsibilities" toward their patients.[3] And the law may properly demand the realization of those fiduciary responsibilities and expectations, including the absence of any conflicts of interest and the preservation of client confidences.[4]

But do "charges" have an analogous expectation? Or perhaps "charges" see their service-provider as

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beholden to external values, as subject to higher authorities. Perhaps it is precisely this independence of the service-provider from the "charge" that the "charge" sees as valuable. Indeed, those who provide religious services may see themselves as beholden to those higher values, rather than to the client. As such, "charges" may sometimes be aware that their clergy serve other interests as well, and that these interests and values may sometimes take precedence over what the "charges" perceive as their own interests. In such situations, in the absence of any mutual expectation of a fiduciary relationship, it would be difficult to point to an "expectation of confidentiality."[5]

I do not assert that all clergy-parishioner relationships are charge-like rather than client-like. Of course, there is a spectrum between the pure "charge" and the pure "client" relationship. Many counseling relationships may be a hybrid of the two. But Griffith and Young's generalization that there is always a "basic societal expectation" of confidentiality is patently incorrect. There is sufficient classic rabbinical authority, the higher values to which any Orthodox Jewish rabbi would be subject to, to justify the behavior of the rabbis in *Lightman* v. *Flaum*, without, of course, taking into account the murky factual issues discussed earlier.[6] Whether the average Jewish congregant would be aware of this authority, of course, would vary from congregation to congregation, indeed from congregant to congregant. Such complex religious-cultural issues may be extraordinarily difficult to unravel. I doubt whether the secular judiciary would be competent to handle this task. My point, however, is simply that one can make no simple assumptions regarding any expectation of confidentiality.

This brings me to the second point—the constitutional problems with judicial enforcement of this alleged expectation of confidentiality. It hardly needs to be repeated that according to long-standing judicial interpretations of the First Amendment, American courts are precluded from interfering in religious disputes.[7] Such impermissible interference would include examinations of religious doctrines and practice and inquiries into whether religious law was violated.[8] Moreover, even setting pure First Amendment problems aside, it can seriously be questioned whether secular courts are competent to adjudicate often arcane points of religious law. And, as noted earlier, it is precisely these arcane, complex points that would be essential in determining whether any expectation of confidentiality existed. As such, despite the claims of Griffith and Young, there are weighty constitutional considerations that would oppose secular examination of whether any expectation of confidentiality existed under the specific circumstances.

In the end, perhaps the difficult case of *Lightman v. Flaum* should be seen as an example of the limits of the law. The law is a blunt secular tool that, as the First Amendment recognizes, cannot be easily applied to all disputes in our society. And these limits are not at all artificial. They are simply a formal, legal recognition of the problem of applying commonly accepted values to subgroups that may not recognize such values. Application of such values would not realize any "societal expectations"—they would simply impose foreign values on groups that do not recognize them. To a certain extent—an extent that always changes according to the changing values of our society—our pluralistic society recognizes the distinctiveness of such groups. And, like any other aspect of democracy, this has costs as well as benefits. A healthy respect for the costs of organizing our society as a democracy can only help to preserve the benefits that we all desire.

References

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4. American Bar Association: ABA Model Code of Professional Responsibility EC 4-1. Washington, DC: American Bar Association ("[T]he *fiduciary* relationship existing between lawyer and client. . .require the preservation of the lawyer of confidences and secrets"). For a discussion of the fiduciary status of physicians and psychologists see Rodwin MA (Ref. 1)
5. For a discussion of such religious issues to the specific context of Jewish care-givers see Bleich JD: Contemporary halachic problems 2. New York: Ktav, 1989, pp 74–80
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8. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)