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RESPONSE TO *JUDGING RELIGION* BY WINNIFRED FALLERS SULLIVAN

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In her paper Professor Sullivan sets forth an admirable ideal: that we in the law should talk about religion as a distinctive human activity, without either engaging in theology ourselves or erasing what is important about religion.¹ We should, in her words, learn to acknowledge religion without establishing it.² For this activity, as she has also argued in *Paying the Words Extra*,³ the discipline of the history of religion can serve as a model, for there too people strive to reflect what is distinctive about religion without committing themselves to the validity of a particular theology or set of religious practices.

The question is how we are to do what she recommends. How are we to talk about religion? In what language? Her answer, very congenial to me, is that we should not proceed from general theological premises down to particular cases. It is important for the law to avoid testimony about what Christians or Jews, for example, do or do not believe, or what their religions require, or do not require. As she says, to make those questions legal questions is to involve the civil courts in determining them, in ways that amount to a kind of establishment. Rather, Professor Sullivan recommends that we proceed in a more open-textured way from the particulars of the case as these are perceived by the relevant people.⁴ What does the wearing of this particular piece of jewelry, or this practice of ingesting a mushroom, actually mean to the person claiming its religious significance? This kind of attention to the individual is harder and more expensive to perform than reference to official bodies of belief, but at least with respect to the action of the States, the law is operating under the rubric of due process, for which individualized judgments are appropriate. The question for the court should not be so much whether the beliefs of

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1. Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441 (1998).

2. *Id.* at 442.

3. WINNIFRED FALLERS SULLIVAN, *PAYING THE WORDS EXTRA* (1994).

4. Sullivan, *supra* note 1, at 454-58.

a group are violated by a particular action of the State, but whether the beliefs of an individual have suffered inappropriate invasion. This question is harder to review. This means that on appeal attention will be given more to the quality of the judicial process than to the substantive outcome. Particularly given the fact that we are working under the Fourteenth Amendment here, this may be right.

Some questions do present themselves about Professor Sullivan's position. Does she mean that individuals may not benefit from the position of their group unless they can show that they themselves have the belief in question with a required degree of intensity and sincerity? An example might be a Quaker who wants classification as a conscientious objector. It was the practice of many draft boards to grant C.O. status to Quakers, and other members of the traditional "peace churches," without much individualized examination. Does it follow from Professor Sullivan's argument that this practice was wrong? I think so, but I do not think that this is a bad thing. On the contrary, it makes sense to me that each individual should have to establish his or her own claim, and not gain much benefit from the position of the larger group of which they are a part.

The second question has to do with the outer limits of her position. Can anything be a religion? One thinks here of the systems of belief associated with Karl Marx, Sigmund Freud, or modern market economics. Or, to take another kind of example, are baseball, fly fishing, or skeet shooting religions if they are of sufficient importance to the individual? Or must the importance be "religious" in nature, and, if so, what can we mean by that?

Here I think that Professor Sullivan might wish to invoke a version of Kent Greenawalt's analogical method and argue that anything can indeed be a religion, but qualify this by the obvious point that the further away the particular practice is from those that are undeniably entitled to the label "religion," the harder it will be to prove one's case. One might take fly fishing as an example: this is a practice engaged in by many people with intensity and fervor, and talked about in overblown and sentimental ways, sometimes in a depreciated version of the language of religion. Yet not always depreciated.

Think of Norman MacLean's famous book, *A River Runs Through It*, which begins this way: "In our family, there was no clear line between religion and fly fishing."⁵ This is partly a joke, partly self-mockery; but one can read the book as a whole as showing how that

5. NORMAN MACLEAN, *A RIVER RUNS THROUGH IT* 1 (1976).

sentence could be true, at least for the three men whose story is told in it. Like *Young Men and Fire*, this book can be seen as a seriously religious text, the theology of which is almost entirely performative or enacted, rather than expository.

I think that if Professor Sullivan's position were worked out in practice, we would find that as we focus on particulars, questions of procedure become increasingly important. As I argue in my own contribution to this symposium, where the judgment is particular and discretionary, control must be procedural rather than substantive. Here, as in custody and sentencing cases, the acknowledgment that general rules or principles really will not suffice should lead to increased attention to the propriety of the procedures used by the trial court and others. Thus, it might follow that in the particular context of free exercise claims it should be a jury or a court, not an administrative agency who decides the question of religious quality; the claimant of a religious interest ought to be free to introduce evidence of a very wide ranging kind; and there should be a system of appeals.

All this may suggest a way of giving some further content to the idea, shared by Professor Sullivan and Lawrence Rosen, of process and cultural style as a standard of judgment. Here the style would consist of the focus on particulars, the treatment of traditional religion as relevant but not conclusive, and the insistence upon fair procedures.

As for a language in which to talk about religion, we will never have a language with the objective precision of botany or geology. However, like anthropologists, we can expand our own imaginations with particular examples. What we need is not more theory, but more experience, both practical and imaginative. With experience of that kind, we might begin to approach Professor Sullivan's ideal.

