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THE CASE FOR RELIGIOUS VALUES IN JUDICIAL DECISION-MAKING

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Perhaps few things are as troubling to contemporary minds in the United States as the prospect that religious values will somehow affect the way public policy is shaped. Judging from the writings of respected thinkers such as Professor Kent Greenawalt of Columbia Law School,¹ Professor Stephen Carter of Yale,² and the views of political leaders such as former New York Governor Mario Cuomo³ and former Vice-Presidential candidate Geraldine Ferraro, there is considerable anxiety—if not outright fear and hostility—about the role that religious values play in the way that policy makers understand and justify their public policy positions. The judicial branch has not been immune from this concern or untouched by it. Justice Antonin Scalia of the United States Supreme Court has been criticized for expressing his religious views in public speeches, with the criticism apparently based on fear that his reasoning either signals a prejudiced disposition inappropriate for a judge, or that it suggests a favorable attitude about using religious values to shape judicial decisions.⁴ A judge in Alabama has become controversial because he posted a copy of the Ten Commandments in

* Judge, Arkansas Court of Appeals, and Pastor, Emmanuel Baptist Church of Little Rock, Arkansas. I am especially grateful to Dean Howard Eisenberg and Assistant Professor Scott Idleman of Marquette Law School for the invitation to participate in this conference, and for the courtesy extended to me during my stay. I am also indebted to Colette Dodson Honorable, one of Dean Eisenberg's students during his tenure as Dean of the University of Arkansas at Little Rock Law School, who now serves as my law clerk and has helped me to develop this paper for presentation. Finally, I appreciate the comments and observations given to me during and after the Marquette conference by the panelists who responded to the ideas advanced in this paper, as well as the comments of other informed observers on this issue.

1. See KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

2. See Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989).

3. See Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (1984).

4. See David Barringer, *Higher Authorities*, 82 A.B.A. J. 68 (Dec. 1996). The article briefly mentions the controversy that followed Justice Scalia's speech at a prayer breakfast sponsored by the Christian Legal Society at the Mississippi College School of Law in April 1996.

his courtroom.⁵ In *Idaho v. Freeman*,⁶ a litigant sought the recusal of a federal district judge because he was a member and leader in the Church of Jesus Christ of Latter Day Saints (Mormon). In *Feminist Women's Health Center v. Codispoti*,⁷ an abortion clinic filed motions seeking the recusal of Judge John T. Noonan, Jr., of the United States Court of Appeals for the Ninth Circuit, alleging that his "“fervently-held religious beliefs would compromise [his] ability to apply the law.”"⁸ Both cases involved explicit arguments that the judges were somehow impaired in their abilities to reason because they held religious beliefs.

As a sitting state appeals court judge and Baptist pastor, I view these developments with interest and regret. I do not believe that the public policy process is necessarily threatened when judges include religious values in judicial decision-making, despite the considerable discomfort that is expressed in liberal political theory. To the contrary, the prevailing aversion to any influential role that religious values might play in judicial decision-making does a disservice to the deliberative processes that judges employ and deprives society of the benefit that may be obtained from an open and uninhibited debate of various sources of moral knowledge. It also dehumanizes religiously devout judges by requiring them to either abandon the role of religious faith in their concept of moral knowledge or falsely mask the operation of that faith in the deliberative process.⁹ Instead of treating religious values as inherently suspect when held by judges, or as automatically impermissible factors for influencing judicial decision-making, we ought to honestly consider the way that religious values can operate within the decision-making process consistent with our views of pluralism and religious tolerance, tempered by our concern for the Establishment Clause to the First Amendment of the federal Constitution. We are not likely to do so, however, while we hold the notion that religious values are somehow more offensive to the way that judges decide than economic values, social values, political ideology, or other secular values that influence the way that judicial decisions are reached.

5. *House Offers Support for Alabama Judge in Ten Commandments Dispute*, L.A. TIMES, March 6, 1997, at A16.

6. 478 F. Supp. 33 (D. Idaho 1979).

7. 69 F.3d 399 (9th Cir. 1995).

8. See *Codispoti*, 69 F.3d at 400 (quoting plaintiff's petition).

9. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 213-32 (1993).

I. JUDGES ARE VALUE-SENSITIVE PEOPLE IN A VALUE-RIDDEN PROCESS

The idea that religious values must not influence judicial decision making is a direct assault on the idea that judges are value-sensitive people who may properly be concerned about issues of ultimate concern. After all, religious values address what the theologian Paul Tillich called matters of "ultimate concern" as opposed to matters of "preliminary concern."¹⁰ Religion ascribes meaning to human existence that both transcends and encompasses the sensory, intellectual, emotional, social, political, and cultural elements of our being. To view life, relationships, responsibilities, and conduct with concern for that ultimate meaning is to view it religiously. To be sure, it is both possible and, apparently, popular to view life, relationships, responsibilities, and conduct without regard for ultimate meaning or one's relationship to ultimate meaning. However (and we must never forget this as we ponder the way that religious values may or may not influence judicial decision-making), the choice about whether to view human existence, conduct, and the exercise of one's professional and other responsibilities in terms of ultimate meaning is a choice about values (and religious values) that only value-sensitive and value-sensible beings can make.

Judges are value-sensitive and value-sensible creatures, and our work involves deciding how to apply principles of jurisprudence to the

10. PAUL TILLICH, SYSTEMATIC THEOLOGY 11-15 (1951). In discussing this view of religious experience in terms of "ultimate concern," Tillich wrote:

Ultimate concern is the abstract translation of the great commandment: "The Lord, our God, the Lord is one; and you shall love the Lord your God with all your heart, and with all your soul and with all your mind, and with all your strength." [Mark 12:29 (Revised Standard Version)] The religious concern is ultimate; it excludes all other concerns from ultimate significance; it makes them preliminary. The ultimate concern is unconditional, independent of any conditions of character, desire, or circumstance. *The unconditional concern is total: no part of ourselves or of our world is excluded from it; there is no "place" to flee from it.* [Psalm 139] *The total concern is infinite: no moment of relaxation and rest is possible in the face of a religious concern which is ultimate, unconditional, total, and infinite.* The word "concern" points to the "existential" character of religious experience. We cannot speak adequately of the "object of religion" without simultaneously removing its character as an object. That which is ultimate gives itself only to the attitude of ultimate concern. It is the correlate of an unconditional concern but not a "highest thing" called "the absolute" or "the unconditioned," about which we could argue in detached objectivity. *It is the object of total surrender, demanding also the surrender of our subjectivity while we look at it. It is a matter of infinite passion and interest (Kierkegaard), making us its object whenever we try to make it our object.*

Id. at 11-12.

competing aspirations of litigating parties. Just as economic values, social values, values about political ideology and the function of government in human society, and values about risks and benefits can be analyzed and included in the jurisprudential way judges decide cases and controversies, religious values can also be analyzed and included jurisprudentially. In fact, if religious values really do address issues of ultimate concern that transcend and encompass all other or "preliminary" concerns, it is unrealistic to demand that a person who is sincere in her religious conviction disown or discount that conviction when she assumes judicial office, when she ponders cases, and when she explains the reasons for her decisions. Also, the judicial power is not exercised or held in a moral vacuum. Power is never morally neutral, whether exercised by voters, by legislators, executive officers, or judges.

Rather than suspecting the reasoning of the judge who honestly includes her religious values in that process, we should suspect the judge who maintains that he is being intellectually honest about judicial decision-making devoid of the religious values that he professes to hold. For example, in my state (Arkansas) as in many other jurisdictions, judges are elected by popular vote. In many instances the candidates for judicial office include their religious affiliation in their campaign materials. This is a flagrant assertion of religious identity and a suggestion that the candidates are influenced by considerations of ultimate meaning that they believe voters need to recognize. But many respected observers of the judicial process believe that when the successful judicial candidates assume office after winning the election, they should either jettison their religious beliefs or refuse to be influenced by them when deciding cases. Requiring religiously devout judges to jettison their faith when they decide cases, after permitting them to tout their faith in order to be trusted with judicial office, is illogical. Suggesting that religiously devout judges must refuse to be influenced by their faith when they work invites intellectual dishonesty at best, hypocrisy at worst. After all, hypocrisy is merely the act of feigning to be what one is not, or to believe what one does not. Hypocrisy disguised as political orthodoxy is nonetheless hypocritical, however convenient it may be for the hypocrite or however comfortable it may leave those who are uneasy with views different from that professed orthodoxy.

II. THE MYTH OF LEGAL POSITIVISM

Much of the concern about the legitimacy and propriety of judges

considering religious values in reaching judicial decisions stems from what I consider an unwarranted faith—and one can hardly call it anything but faith—in legal positivism. Judges, we are told, must serve society by reasoning their way to results based on commonly accepted rules and principles of law in the society. We claim to respect the role of moral knowledge in helping us think and debate our varying ideas about what the legal principles should be, and we profess a desire to have men and women serve as judges who possess moral knowledge. But we want the moral knowledge to originate from secular sources, not those that are religious.¹¹ We not only favor the secular sources of moral knowledge, we are deeply suspicious about moral knowledge based on religious conviction. As Dean Ronald Thiemann of Harvard Divinity School reminded us yesterday, religious values are dismissed as inappropriate because they are deemed as either irrational or non-rational, and therefore, unsuitable in moving political discourse toward the consensus required by liberal democratic theory.

Even when observers such as Kent Greenawalt have propounded theories affirming the legitimacy of moral ideas influenced by religious conviction in public policy discussions, they appear to hold that the moral ideas held by the policy makers should be justified in secular terms.¹² While this is far better than forbidding religious values from any role in the formulation of moral ideas concerning issues of public policy, even this approach would force religiously devout judges to disavow an essential part of their personalities, as Stephen Carter has observed.¹³ The idea that the religiously devout judge can consider religious values in the decision-making process as long as those values are stated in secular terms is merely another variation of the disavowal process, as if to say that it is all right for the religiously devout judge to

11. GREENAWALT, *supra* note 1, at 239-41. See also KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 141-50 (1995). Professor Greenawalt addressed this concern more expansively herein, and treated the concerns about judges relying upon their personal religious values.

12. GREENAWALT, *supra* note 1, at 239. Greenawalt states that, “[w]hat is legally relevant is generally conceived to be the same for all judges, so neither personal religious convictions nor any other idiosyncratic convictions are legally relevant. Given this understanding about judicial opinions, it follows that opinions should not contain direct references to the religious premises of judges.” However, Greenawalt also observes that the model of judicial decision-making that holds judges to determine results based on existing legal materials is implausible because of the category of cases where “no determinate answer can be derived from existing legal materials.” *Id.* at 240. In doing so, Greenawalt has accurately noted that legal terms such as “cruel and unusual punishment” or “good moral character,” seem to refer the judge outward to non-legal domains. *Id.*

13. Carter, *supra* note 2.

include her religious values during the deliberative process so long as she does not act as if those values affect her decisions.

III. THE FREEDOM TO HEAR AND THE RIGHT TO BE HEARD

I continue to be guided by something that Robert Knowlton, the Distinguished Professor of Law at Rutgers University who spent his last teaching years at the University of Arkansas School of Law, said during his commencement speech to my law school graduating class. Knowlton urged us, in our work as lawyers, to keep an open mind to all knowledge from whatever source or discipline it may come. I think his words apply as well to the work that judges do. Judges must be open-minded to all sources of truth if we are to be competent deliberators of the value-laden issues brought for our decision. We are free to hear the voices of religious values, mathematical principles, classical literature, popular music, and quotations by Sherlock Holmes in our effort to understand the issues we must consider. This is another way of saying that judges are free to hear the voices of William Shakespeare, Sir Arthur Conan Doyle, John Locke, Robert Browning, Johann Wolfgang von Goethe, Oliver Wendell Holmes, Moses, Jesus, Sojourner Truth, Frederick Douglass, and Martin Luther King, Jr., without embarrassment or hesitation as we deliberate.

We also have the right to include religious sources when we justify the decisions we reach. Religious values are neither more, nor less, appropriate factors for justifying judicial decisions from a philosophical perspective. As far as moral philosophy is concerned, religious convictions are neither irrational nor non-rational; rather, faith is trans-rational, as Gardner Taylor has said.¹⁴ Appeals to trans-rational arguments and sources are not illegitimate or unattainable. Granted, religious values are not universally shared by all persons, or even all judges for that matter. The same is true about every other kind of knowledge that affects judicial decision-making. All judges do not share the same knowledge of history, economics, literature, mathematics, science, and the arts either, let alone agree about these things. Neither uniformity nor unanimity of thought is demanded or desired in the process of judicial decision-making.

The point is not that all persons or all judges hear (or should hear) the same voices, but that all the voices have a right to be heard and

14. Taylor, Senior Pastor Emeritus of the Concord Baptist Church of Christ, Brooklyn, New York, remarked that, "faith is trans-rational." Lecture at the E.C. Morris Ministers Institute held at Arkansas Baptist College, Little Rock, Arkansas, March 28, 1996.

articulated in the process that judges use to reach and justify our decisions.¹⁵ This also means that all the voices (including those of religious faith) have the right to be challenged and criticized within the judicial decision-making process. The mere fact that religious voices are different from others does not make them less reliable, less articulable, or less deserving of consideration and assertion, nor are they less susceptible to candid criticism and debate in the judicial context. The best way that society can assure itself that religious values do not improperly influence judicial decision-making is by permitting them to enter the intellectual competition of competing moral views where they will be examined, challenged, debated, and defended as more or less helpful means of reaching just decisions.

IV. HOW CAN DEVOUT JUDGES RESORT TO FAITH

Religiously devout judges may state legal problems in *both* their existential and their ontological contexts. After all, the whole idea that law serves to advance the end of justice involves that analysis. As judges, we are bound to uphold and apply the law of our forums. That existential duty is taken, however, to fulfill the ontological demands of justice. Law is the preliminary concern; justice is the ultimate concern. The devout judge can—and some may argue should—analyze legal problems from both perspectives. Doing so will necessarily mean considering religious convictions concerning the meaning of justice on those existential issues not already determined by existing legal materials. To the extent that faith informs and shapes a judge's understanding of justice—and to the extent that religious teachings within the society contribute to some larger and wider sense of justice within the society—the devout judge does a vital service by openly considering the existential rule of law *and* the ontological imperatives of justice.

Justice and legal rules may not, and will not, always be congruent.

15. Stephen Carter stated the issue succinctly and well when he said:

What is needed is not a requirement that the religiously devout choose a form of dialogue that liberalism accepts, but that liberalism develop a politics that accepts whatever form of dialogue a member of the public offers. Epistemic diversity, like diversity of other kinds, should be cherished, not ignored, and certainly not abolished. What is needed, then, is a willingness to *listen*, not because the speaker has *the right voice* but because the speaker has *the right to speak*. Moreover, the willingness to listen must hold out the possibility that the speaker is saying something worth listening to; to do less is to trivialize the forces that shape the moral convictions of tens of millions of Americans.

CARTER, *supra* note 9, at 230.

The devout judge serves a vital role in those cases of incongruence or conflict by recognizing that the demand of the law appears to conflict with justice. By doing so, the devout judge necessarily relies upon religious convictions, even when rendering judgments according to the prevailing legal standards that do not comport with the judge's understanding of justice. If the judge dissents because a rule of law is unsound, does that dissent take any less force because the rule of law is seen as unjust? If the judge concurs in a judgment because the law is clear, however much the law may appear to fall short of the ultimate concern of justice, the judge can nevertheless do so despite a concern that the law does not serve justice, and should be free to express the reservation about the justness of the result. Of course, the devout judge may also be moved to recuse from cases that present an unacceptable conflict between law and justice. When doing so, the judge apparently decides that it would not be *right* to participate in a case because of what is perceived as an unacceptable conflict between the preliminary concern of law and the ultimate concern of justice.

The devout judge may not, and should not, substitute religious conviction for judicial analysis when existing legal material is at hand. Murder is punished as a crime because society agrees that the unjustified taking of human life is wrong, not simply because the Sixth Commandment reads "Thou Shalt Not Kill." The devout judge who relies on religious conviction as the sole basis for judicial decision-making is acting as a prelate, not as a jurist. The judge whose notion of justice includes a sensitivity for the interplay of religious and other values in the decision-making process is reasoning judicially, even when including religious values in the reasoning.

Finally, devout judges must remain sensitive to the important role that religious values and their proper expression serve within a pluralistic society. If the devout judge does not remind society that certain conduct is condemned as offensive to domestic tranquillity, contrary to the laws of nature, or inconsistent with truth, then society is denied the value of that information and judgment in its pursuit of justice. The give-and-take of competing moral, behavioral, intellectual, and cultural philosophies is how a pluralist society operates. The devout judge, as a citizen of two societies, helps society remain pluralist by thinking and acting in a holistic way, not by trivializing religious conviction.

V. CONCLUSION

Bob Knowlton ended his commencement speech by reminding my

graduating class that Learned Hand said justice should not be rationed. I think this also means that the sources from which we obtain our conceptions of justice should not be artificially restricted. We must certainly deliberate and debate their validity with vigorous diligence out of proper regard for sound reasoning. Our debate must include deference to the constitutional protection contained in the Establishment Clause of the First Amendment. However, a decision-making process built on concealing entire spheres of moral knowledge such as that constituted by religious values is not likely to produce a full-bodied sense of justice, however sophisticated its body of law is perceived to be.

We must learn to listen to the voices that impart moral knowledge with open and sharp minds. We will not always agree with what we hear, but even that is not bad. By listening to and debating the messages of religious values (along with other sources of moral knowledge) that can apply to judicial decision-making, we will increase the chances of reaching decisions that are just. In the final analysis, that is simply another way of saying that we will increase the chances of reaching decisions that are right, even if we argue about whether we are doing so, and even if we disagree about what "right" or "just" ultimately mean.

