Response to Judge Wendell Griffen

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I want to express my appreciation to Judge Griffen for his thoughtful and insightful exploration of our topic. As a nonacademician who struggles with the language of academic discourse, it was delightful to encounter such a clear and straightforward exposition of these issues. While I disagree with some of Judge Griffen’s conclusions, I can do so only because he articulated so clearly and honestly the difficulties this topic presents.

There is much in Judge Griffen’s presentation I wholeheartedly endorse. I agree that no thoughtful judge decides cases in which the result is not dictated by precedent or statutory language without taking into account, at some level, deeply personal and frequently religiously-based views about human and societal good. As a trial judge, I would go a bit further. In the vast generality of cases, those that do not present hard issues of first impression about what the law should be, our personal moral views also come to bear. When I, as a trial judge, must decide whether a contract should be enforced over claims of fraud or overreaching, or when I must decide whether a confession should or should not be suppressed because of the conduct of the police in dealing with a suspect, I must first determine and describe what happened, based on my interpretation of the testimony and other evidence before me. This act of interpretation is influenced by deeply held beliefs about how human beings do and should behave in their dealings with one another. These beliefs influence, to some degree, which accounts of the facts I will believe and which I will not believe, and what facts I will select for emphasis. My moral beliefs are part of a stew of factors that unavoidably underlie my decisions.

I believe all judges act this way, whether they consider themselves religious or not. Martha Nussbaum, whom I understand does not consider herself a religious writer, suggests that there is an idea of “human flourishing” which we can think about without any religious referent; her model of a person who taught us to judge with this concept

in mind was Walt Whitman, someone who was neither a judge nor, as far as I am aware, a churchgoer. ¹

Where I disagree with Judge Griffen is in his assertion that it is appropriate to include religious sources when we justify our decisions, and that our failure to do so amounts to concealment. While we certainly have a right to use religious sources as justification, I believe it is inappropriate and imprudent to do so. To explain why I feel this way, I must explain my view of the proper role of courts and judges in our society.

Courts are imperfect institutions, staffed by judges who are imperfect creatures with imperfect knowledge and wisdom, trying to make judgments based on the testimony and records of imperfect witnesses. As a result, judicial decisions are likely from time to time to be wrong. They may be wrong because the judge makes the wrong decision on who is lying and who is telling the truth; they may be wrong because the judge's assessment of the weight of the evidence is flawed, in that he or she gives undue emphasis to some facts and too little weight to others, thereby arriving at a distorted view of what happened; they may be wrong because the judge misinterprets or misapplies the law.

People who bring cases to court are engaged in what is frequently very hostile conflict. These people may believe, correctly or incorrectly, that the decision in their case is wrong; approximately 50% of them in every case are very likely to reach that conclusion. Nevertheless, the judge's job, as I see it, is to direct a resolution that will appear sufficiently reasonable to both sides that even if they believe the judge is wrong, they will consent to cease their conflict. We all know of cases where the judge failed in this undertaking. We know of cases where disappointed litigants resorted to violence. We also know of cases, like the recently famous incident involving Judge Harold Baer in New York, where a party's dissatisfaction with the result in a case led to national political conflict.

Pursuant to my philosophy of judging, I work hard to try to avoid such incidents. My goal is to come up with results which leave both sides feeling that they have been sensitively and respectfully heard and that my decision is fully justified by those texts accepted as authoritative in the law. I do not want the parties to experience my decision as an idiosyncratic expression of my particular personality or background or to worry that the result would have been different if they

had pulled another name in the judge lottery when they filed their case. I am required to state reasons for my decisions in order to demonstrate that my decisions are grounded in, and can be justified by, the evidence before me and recognized sources of legal authority. If people do not perceive my rulings as fair, by which I mean sensitive to all the issues and interests at stake, and if they do not perceive them to be grounded in authority, they will, I believe, be less likely to accept the ruling as a resolution to their conflict.

Religion is a flash point for controversy and disagreement. Scholars like Stephen Carter argue that this ought not to be so, but their arguments do not alter the reality. The history of human civilization is littered with horrors inflicted on minorities in the name of religion. Even in our own country, which is criticized with some basis for being paranoid about the possibility that some public act will “establish” religion, the majority’s hostility or insensitivity to the minority routinely causes substantial injury. Anyone who denies this fails to hear the voices and feel the pain of those whose consciences bring them into conflict with prevailing mores.

I love Judge Griffen’s point that we as judges must be open to all knowledge, from whatever source or discipline. As judges in a country committed to religious pluralism, that means to me that we must hear the voice of the dissenter as respectfully as we hear all other voices. That means justifying a decision in terms that the dissenter can access and assent to as fully as anyone else. Insofar as we are unwilling or unable, as sometimes happens, to do this, I believe we are weakening the consensus that allows our judicial system to fulfill its responsibility to our society.