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Tributes to Kent Greenawalt

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TRIBUTES

KENT GREENAWALT: AN APPRECIATION

*Barbara Aronstein Black**

There are some tasks that present themselves as, at the same time, an opportunity and a challenge. Crafting a brief tribute to Kent Greenawalt is just such a task. It is first—and I should say foremost—an opportunity to express in a public forum one's high regard for an esteemed colleague and valued friend, and, then, it is a challenge to do justice to his extraordinary accomplishments, to the man, and to his work.

In dedicating this issue to Kent, the *Columbia Law Review* honors one of its own, whose association with Columbia Law School and the *Review* goes back over half a century—a most appropriate reciprocation of the honor that Kent himself, by his devotion to the highest academic standards of teaching and scholarship, has brought to both of these institutions.

Most Columbia Law School graduates of the era in which Kent was a student have great regard for the education they received at this school. And they have great regard for the men who taught them: They believe that (cliché or not) there were giants in those days. And (clichés usually being well-founded) as these things are measured, so there were—perhaps chief among them, Kent's mentor, eventual colleague, and friend, Herbert Wechsler.

Of course Kent's honoring of his mentor Herb Wechsler took a very concrete turn with the 1978 publication, in an earlier tribute issue of this law review, of the article titled *The Enduring Significance of Neutral Principles*, his analysis of the famous—or notorious—Wechsler Holmes Lecture.¹ At the publication of Wechsler's work, there was a great fluttering of the doves in the legal academy, and a number of law school luminaries hurried into print to protest what they took to be the problematic nature of Wechsler's thesis. Kent's 1978 article is then, as its title suggests, in the nature of a rejoinder, and a defense. What I want to say about this article is that it is in many ways quintessential Greenawalt: a careful, patient, searching inquiry that uncovers the many dimensions of

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1. Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *Colum. L. Rev.* 982 (1978).

the problem under examination; moderate, balanced, sensible conclusions that add up to wisdom.

And so Kent went on to follow the examples of his teachers, and to do them proud. He has produced a body of scholarship that, in its breadth, and most particularly its depth, in its reach and in its richness, puts him in the very top rank of legal scholars. But I want to suggest that while thus honoring those who taught him, Kent has in important respects departed from their ways. He has departed from traditional ways because the world of the legal academy has itself departed from traditional ways. It has altered almost out of recognition, and Kent, as teacher, as colleague, and as scholar, is as comfortably at home in this relatively new universe as, when a student, he was comfortably at home in the old.

The differences between the law school of the early 1960s and that of today are many and deep, but I just want to zero in on two of them, one having directly to do with scholarship, the other somewhat more diffusely with what I'll call the scholarly life.

In Kent's student days (and in mine as well almost a decade earlier) it was an accepted precept that for something to merit the designation "scholarship," it must be impersonal; at the Columbia Law School of the time this was dogma. For a work of scholarship to be personal was as great a sin, and the same genus, perhaps species, of sin, as for a judicial ruling to be "result oriented." Even in such an intellectual climate, it is often possible to see some hint of the person behind the scholar, but typically the person who was the scholar would consider that something of an embarrassment, an obstacle rather than an aid to the attainment of the "objectivity" that alone was believed to legitimate scholarship. The solidity of this belief can be seen in the small but nontrivial dictate that a scholar steer clear of the first person singular: It was "we," "we," "we" (all the way home, as it were).

The world of scholarship has cast off this precept with a vengeance; it is a mere curiosity now, forgotten by most, and unheard of by the young. An intellectual history of this change would, I am sure, reveal it to have been more revolutionary than evolutionary, sweeping in with so many social and cultural innovations in the 1970s, and related to some of them—but that is an aside. The point here is that a fair bit of Kent's work is personal, and some of it is deeply personal. And to me this property of his work is a thing most decidedly of value. In the first place, it actually *aids* in the attainment of genuine objectivity. Then, perhaps more significantly, it gives to the work a quality—indeed a haunting quality—whose effect on the reader is wonderfully out of the ordinary course of scholarly business.

Accompanying this salutary change in the rules of the scholarly game there has been a virtual revolution in the scholarly life of a legal academic. I can report that scholarship in my student days—and in Kent's as well—was conceived of and practiced as a solitary endeavor. Of

course there were collaborations, usually on casebooks, now and again on articles or treatises or monographs. But what was nowhere in sight was the now-ubiquitous workshop. Perhaps in other disciplines, even then, the practice of general collegial involvement in every step of each colleague's scholarly process and progress was routine; in the legal academy, until the 1970s, it was virtually nonexistent.

Kent is a full and extraordinarily valuable participant in this relatively new—and better—universe, devoting time and talent to such endeavors as the legal theory workshop and philosophy workshops and seminars, engaging with colleagues at faculty talks and on any number and variety of communal scholarly occasions, offering encouragement to others to join him in the scholarly enterprise.

Relatedly, Kent is always willing to engage in scholarly dialogue, and has had much opportunity to do so, because the excellence and power of his work has commanded so much attention. When he speaks, everyone listens—and a good many comment. And not infrequently Kent has joined issue with such commentators. Would that every academic, legal or otherwise, were as respectful of his critics, as open-minded to contrary opinion, as candid about his own uncertainties, as Kent Greenawalt.

It is conventional wisdom that no one of us is indispensable to a great institution such as the Columbia Law School. But there are a few who come mighty close to being exceptions to that rule, a few whom we are tempted to think of as indispensable to the institution—and Kent Greenawalt is one of that number. This was recognized by Columbia University some years ago, when Kent was designated University Professor. That was a happy moment for Kent's proud Dean, namely me: Casting conventional wisdom dismissively to the wind, I did view Kent as indispensable to this law school. And still do.

THREE DIMENSIONS OF KENT GREENAWALT'S EXCELLENCE

*Vincent Blasi**

Kent Greenawalt possesses so many admirable personal and scholarly qualities that it is difficult to know where to begin. One of his most notable traits is a penchant for specificity. He takes the trouble to identify exactly what concerns, methods, assumptions, sources of authority, levels of confidence, and perceived implications inform his analysis. When his grappling with a subject results in some irreducible indeterminacy, he specifies what it is. He deploys examples in abundance to ratchet up the level of specificity. Here I want to emulate this worthy characteristic of his scholarship by commenting upon three specific ways in which Kent's work is distinctive to the point of being amazing.

I. DISTILLATION

All scholars need to schematize. We seek to identify patterns that impose an order of sorts on unruly data and dynamic, elusive phenomena. The reader's comprehension depends on it. The full complexity of our understanding cannot be wholly transmitted. At least that is so if we have something to offer that deserves to be called scholarship. The temptation, however, is to undertake the schematizing before the process of developing understanding is pursued to the fullest practical extent. The orderly patterns take on a life of their own, untethered from the complexity they are meant to illuminate. Kent resists that temptation better than any scholar I know. His writing is replete with definitions, qualifications, and explanations of methodological choices, all of which testify to the thoroughness and honesty of his inquisitive ventures and normative judgments. This is not to say that he fails to digest or prioritize the results of his efforts. It is to say that he passes the Iceberg Test. What appears in his writing rests on a mass of subsurface processing.

Some scholars succumb to a temptation that is the opposite of premature schematizing. Their published work reports their intellectual odyssey so fully and faithfully that their discoveries (if such they be) are more or less inaccessible to all but the most expert, motivated, and patient readers. They refuse to distill. That is a form of self-indulgence, and Kent takes great care to avoid it.

One way he does this is by applying his general ideas to pressing current issues, inevitably simplifying his theoretical insights even as he pursues their practical implications all the way down to ground, specifying how numerous close cases should on balance be resolved. For exam-

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ple, one of his best ideas is that communications that change the moral relations of speakers and listeners the way threats, bribes, and certain kinds of personal insults do constitute a special legally relevant category. Kent calls such speech “situation-altering.” Most communications that convey opinions and information do so in a manner and context that, for legal purposes, can be considered noncoercive. Situation-altering speech is an exception by virtue of its function in altering moral relations. As such, it has little or no claim to First Amendment protection, Kent maintains. This idea is important and subtle enough to require elaboration at a level of refinement that can interest only fellow scholars (including student-scholars, our most persuadable audience) and the odd devotee. But the idea also is potentially significant operationally. For that reason, it cries out for distillation and illustrative application in order to broaden its appeal. Kent has made a point of supplying both.

His great book *Speech, Crime, and the Uses of Language* develops the idea of situation-altering speech and explores its implications in considerable detail.¹ The author’s characteristic appreciation of complexity is on full display. The book demands much of readers, and gives back much in return. When I first read it, I judged it to be the best book about the First Amendment that I had ever read. Nevertheless, I feared that the book’s unremitting fidelity to the difficulty of the questions it was exploring would constrict its readership and shorten its lifespan. Happily, I was dead wrong. More than twenty-five years later, the book is a resource of choice for scholars seeking to identify the proper boundaries of First Amendment coverage. During the last decade, the long-neglected boundary question has been addressed more frequently, systematically, and contentiously than ever before in the academic literature. I am heartened by how routinely and in-depth *Speech, Crime, and the Uses of Language* has been drawn upon in this much-needed correction.²

One reason for the book’s current prominence is that Kent followed it with a different, much shorter book, *Fighting Words*, in which he applies his conceptual insights, including the notion of situation-altering speech, to a range of current issues: flag burning, racially derogatory speech, workplace harassment, and obscenity, among others.³ This book is easily accessible and predominantly schematic, albeit more complete than most such efforts in that it is full of examples that specify exactly where he

1. Kent Greenawalt, *Speech, Crime, and the Uses of Language* 57–68 (1989).

2. E.g., Thomas Healy, *Brandenburg* in a Time of Terror, 84 *Notre Dame L. Rev.* 655, 689–97 (2009); Steven R. Morrison, Conspiracy Law’s Threat to Free Speech, 15 *U. Pa. J. Const. L.* 865, 906–13 (2013); Eugene Volokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones, 90 *Cornell L. Rev.* 1277, 1326–35 (2005); Leslie Kendrick, Note, A Test for Criminally Instructional Speech, 91 *Va. L. Rev.* 1973, 1979 (2005); Note, Rehabilitating the Performative, 120 *Harv. L. Rev.* 2200, 2205–16 (2007).

3. Kent Greenawalt, *Fighting Words: Individuals, Communities, and the Liberties of Speech* 28–46, 47–70, 77–96, 99–123 (1995).

would "draw the line." I believe that *Fighting Words* helped to introduce many readers to the idea of situation-altering speech, which led them back to Kent's earlier, fuller exposition of the reasons for making it a staple of First Amendment analysis. His classic article in the *Columbia Law Review*, *Free Speech Justifications*,⁴ is another example of his commitment to distillation. It is the standard go-to overview of the various reasons for a strong free speech principle, the first place I send students about to commence a First Amendment research project.

My point is that for all his scholarly integrity and ambition, Kent is not too proud or purist to distill his complex ideas into operational form so as to make them useful to persons who may not share his intellectual priorities. He does not write exclusively to refine his own understanding or persuade fellow experts. He writes as well for readers new to the subject and motivated largely by practical concerns. Not all scholars who function at his level of sophistication can say that. And I think it serves the law well when operationally workable formulations and line-drawing judgments come from someone who has first attempted to understand the underlying complexities to the fullest extent.

II. RANGE

Legal scholars differ considerably regarding how wide and various is the range of their inquiries and acquired expertise. Some of us identify a field of interest, then a set of ideas or problems within that field, then a method of scholarly execution that draws on our perceived strengths or fills gaps in the literature. We read and write in that vein almost exclusively for an extended period of time, sometimes an entire career. Other scholars are more versatile, usually because they are temperamentally responsive to unforeseen events, opportunities, or promptings of their curiosity. They make contributions, often of different sorts, to several fields.

Kent is rare in that his work is unfailingly the product of patient, thorough, balanced, nuanced exploration that bespeaks the wisdom and humility that only extended engagement with a subject can bestow. Yet somehow he has managed to practice that demanding method, to the level of leader-in-the-field expertise, in at least *six* fields: freedom of religion, freedom of speech, constitutional theory, legal philosophy, legal interpretation, and criminal law.

Moreover, even within a particular field, his work displays impressive versatility. I have commented above on the variety of his free speech scholarship. Regarding freedom of religion, his two-volume magnum

4. Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119 (1989).

opus, *Religion and the Constitution*,⁵ is, to put it mildly, an exhaustive doctrinal inquiry. With characteristically balanced yet decisive and penetrating analysis, Kent canvasses every significant topic in the field, including topics only beginning to emerge on the doctrinal horizon. Very different is an earlier book, *Religious Convictions and Political Choice*.⁶ There he explores whether, when, and how various political actors should be guided by their religious beliefs and perceived duties when making decisions in the capacity of a public official or responsible citizen.⁷ In the field of legal interpretation, Kent has contributed much to the vigorous modern debates regarding statutory interpretation.⁸ But unlike many participants in those debates, he has had a lot to say about common law interpretation as well.⁹

In no sense is Kent Greenawalt a prisoner of his expertise or preeminence. His inquisitiveness remains his most defining characteristic. He is not afraid to roam or take chances. Best of all, his astonishing range and volume of output come at no tradeoff in quality. In setting standards for himself, he does not exploit the intellectual authority he has earned to reduce his burden of persuasion. His work is as thoroughly argued as that of an ambitious beginner seeking to make a mark.

III. PLURALISM

In the circles in which most of us, including Kent, travel, pluralism is honored. Isaiah Berlin's admonitions¹⁰ about the dangers of seeking or claiming to have found the "one right answer" to any question are celebrated. But of course, almost all of us are closet dogmatists, at least about the matters we know and care most about. These hypocrisies are a matter of degree, but degrees matter. Kent is among the least dogmatic scholars I know. He demonstrates that quality in at least three different ways.

First, he works harder than anyone I read to articulate and respond to the best arguments that might be advanced *against* the position he is maintaining. This is a practice recommended by Cicero and much admired by John Stuart Mill,¹¹ but it is hard to execute faithfully. The whole value of the enterprise depends on going far beyond grudging lip service.

5. 2 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (2008); 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (2006).

6. Kent Greenawalt, *Religious Convictions and Political Choice* (1988).

7. See *id.* at 231–41 (concluding religion inevitably informs decisions of citizens and legislators, and even judges, "within the constraints of the judicial role, should be able to rely on religious premises").

8. E.g., Kent Greenawalt, *Statutory and Common Law Interpretation* 19–74 (2013).

9. E.g., *id.* at 177–277.

10. See Isaiah Berlin, *Four Essays on Liberty* 167–72, 189–92 (Henry Hardy ed., 1969).

11. See John Stuart Mill, *On Liberty and Other Essays* 42 (John Gray ed., 1991) (discussing Cicero).

It is tempting to try to co-opt imagined opponents by disingenuously stating their arguments in a superficially appealing form as a predicate for demonstrating that the appeal is only on the surface. But the illuminating way to use opposing arguments in a scholarly endeavor is to articulate them fully, clearly, and cogently, indeed to develop them creatively in order to learn their strengths. This includes resisting the urge to inflate them, if only slightly, so as to discredit them as overreaching. Discussing opposing arguments productively takes a lot of self-discipline. Kent is scrupulous in that regard and I admire him—envy him—for that.

Second, it is a special treat, one I have experienced many times, to get back critical comments from Kent on a manuscript one has produced. What is special about this experience is that the critical comments invariably are within the parameters and in the service of *one's own* project, not the project as Kent would have conceived it had he been pursuing it. The comments are highly selective because Kent appreciates, as most of us do not, that an author in the midst of a project can absorb only so much constructive criticism without losing his highly personal focus and inspiration. Better yet, the comments are unusually constructive in that they proceed from a close reading of the author's actual detailed argument. This is still another way in which Kent's penchant for specificity helps. Miscommunication is endemic in scholarly discussion. All of us feel misunderstood in the sense that no matter how hard we try to be clear about our claims, our readers too often seem to be responding to a version of our arguments that we don't embrace (or sometimes even recognize). Never with Kent. He gets it. The first time through. Even when he thinks you are wrong.

This devotion to close, faithful reading surfaces also in the many workshops in which Kent participates. His questions are always succinct, on the mark, and in the spirit—as defined by the author of the paper under discussion, not critics with different agendas.

Third, Kent honors pluralism in the way he conducts himself in faculty hiring decisions. Typically, we professed pluralists believe that a strong faculty requires a balanced mix of diverse skills, values, types of knowledge and experience, interests, agendas, and talents, and that the current imbalance would be corrected if we could only hire two or three more persons like ourselves. I have never seen Kent put his thumb on the scale like that. He is not overly generous in evaluating candidates who share his orientation, nor overly critical of candidates whose hiring would exacerbate an imbalance away from the kinds of things he and like-minded colleagues do. He tries hard and successfully to understand what excellence consists in for work far afield from his own.

Most of us, I like to think, are capable of being pluralists in these ways, even if we can never hope to match Kent's scholarly range, sophistication, integrity, and versatility. But whether the various examples he sets are within or beyond our own prospects of emulation, all of us who have worked with him during his fifty years on the Columbia faculty (!)

cannot help but be inspired by the privilege. That such a remarkable scholar, teacher, and colleague should also be a genuinely good man and caring friend is all the more reason to consider this rare milestone truly a grand occasion.

"THINK HARDER, DO MORE, STUDY BETTER":
A TRIBUTE TO KENT GREENAWALT

*Elizabeth F. Emens**

The first volume of Kent Greenawalt's *Religion and the Constitution*¹ is, according to one review, "written with elegance, power, and lucidity—and filled with the kind of wit, wisdom, and *Wissenschaft* that Greenawalt's readers have come to expect from his dozen earlier tomes on the constitutional and philosophical foundations of law, religion, and morality."² The book is hailed as an "invaluable resource"³ and the author "a masterful guide to the range of issues and varied sources concerning free exercise."⁴

Over the years, I have asked my Employment Discrimination students to read selections from this volume. The following passage always sparks lively discussions:

Yet in one aspect religious discrimination differs from other discriminations to which it is commonly linked. Some religious discrimination is what I shall call "positive," a desire to be with people like oneself rather than hostility to those who are different. Such "positive" religious discrimination may not be wrongful in itself.⁵

The students are deeply divided in their responses. While some agree that religion is somehow different from other protected classifications in inspiring forms of in-group preference untainted by hostility to out-groups, many disagree.

Some students disagree only because they battle a ghost. They read Greenawalt to imply that religious discrimination is always "positive" and never rooted in animus or hostility. This misreads Greenawalt, who makes clear a few sentences later his view that "much religious discrimination . . . is ugly, based on bigotry and unjustified stereotypes."⁶

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1. 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (2006) [hereinafter Greenawalt, *Free Exercise*].

2. John Witte, Jr., "Fairer Still the Woodlands": Mapping the Free Exercise Forest, 24 *Const. Comment.* 551, 553 (2007) (book review).

3. L. Joseph Hebert, 17 *Law & Pol. Book Rev.* 71–74 (2007).

4. *Id.* at 71.

5. Greenawalt, *Free Exercise*, supra note 1, at 328.

6. *Id.* at 329.

Others offer more trenchant reasons for disagreeing with Greenawalt's claim that religion is different, arguing that protected classifications other than religion—such as race or sex—can also inspire in-group affinities that are “positive.” They then puzzle over whether they believe that only subordinated groups (such as blacks or women) can form what they consider exclusively positive affiliations. And yet others disagree for the opposite reason: They believe that affiliations organized around these protected classifications are never untouched by hostility to out-groups.

Whatever one's position on these generalizations, anyone who knows Kent Greenawalt the person should not be surprised that he would write such a passage about the existence of nonhostile discrimination. We often write from who we are, even in our scholarly mode. And Kent is a person of such kindness and integrity that he may well assume that the best is possible in others.

Kent writes very little directly about himself. An exception is the early pages of *Religious Convictions and Political Choice*,⁷ where he briefly traces the origins of his sustained study of the interplay between religion and law. He writes there of his childhood, having been “raised in a family in which both religion and the values of liberal democracy were seriously regarded,”⁸ and of his early beliefs: “During my youth, I took it for granted that one's religious commitments and understandings would matter for one's life, including one's life as a citizen, and that liberal democracy was a system of governance that warranted support.”⁹ These views were reflected and strengthened in his public-service endeavors, including a “summer spent in East Harlem working under Norman Eddy in the East Harlem Protestant Parish”¹⁰ and a month working for the Lawyers Committee for Civil Rights in Jackson, Mississippi, in the summer of 1965. He was also influenced by the political work of several close friends and relatives—“all ministers for whom questions of social justice have loomed as very important.”¹¹ At this point in the text, he offers a rare glimpse into his own religious practice: “Though in my adult life I have been only an occasional churchgoer, these close associations have helped confirm my continuing belief in the importance of religious understanding.”¹² He continues in this vein in the first chapter:

With some uncertainty and tentativeness, I hold religious convictions, but I find myself in a pervasively secular discipline. My convictions tell me that no aspect of life should be wholly

7. Kent Greenawalt, *Religious Convictions and Political Choice* (1988).

8. *Id.* at vii. He also tells us that his father was “long head of the board of trustees of the Plymouth Church of the Pilgrims” and “as a child [Greenawalt] went there as well as to the local community church in which [Greenawalt] was confirmed.” *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at viii.

12. *Id.*

untouched by the transcendent reality in which I believe, yet a basic premise of common legal argument is that any reference to such perspective is out of bounds. This personal and professional dilemma helps explain my concern with the place of religious convictions in the process by which laws are made.¹³

These experiences among others—including his reading of Reinhold Niebuhr and his congenial disagreements with Bruce Ackerman—shaped the question that would ultimately drive the book, namely, “whether people . . . properly rely on their religious convictions in deciding what public laws and policies to support.”¹⁴

The book is of course not about Kent Greenawalt. He makes a point of reminding us, after this unusual foray into the personal, that the book is “not relating a personal search for accommodation or explaining where one peculiar set of religious convictions leads.”¹⁵ Rather, “the analysis and conclusions I offer do not depend on the truth or falsity of particular religious positions; they lay claim to broader persuasiveness.”¹⁶ And yet he intends to reach not only those who have thought deeply about these issues already, not only the scholars among or within us. His aims are more broadly humane: “I also hope [the book] will be of some help for those who are trying to sort out in their own lives the appropriate domains of religion and politics.”¹⁷

The help Kent offers these individual readers is not only a nuanced examination of the issues, but a bold and generous conclusion. The book confronts the “many intellectuals who think that religious convictions are foolish superstitions” and “want to minimize their legitimate position in social life without confronting them head on.”¹⁸ Kent concludes that “the claim that citizens and legislators should rely exclusively on secular grounds” is “not only wrong but absurd.”¹⁹ Such a claim, he explains, “invites religious persons to displace their most firmly rooted convictions about values and about the nature of humanity and the universe in a quest for common bases of judgment that is inevitably unavailing when virtually everyone must rely on personal perspectives.”²⁰ Instead of the mere “tolerance of indifference” popular in some intellectual circles, Kent argues that “liberalism demands a high degree of tolerance . . . of a sympathetic mutual understanding of the place that religious premises occupy in the life of serious believers *and* of the dangers to those of different beliefs if religious convictions and discourse overwhelm the

13. *Id.* at 5.

14. *Id.* at 4.

15. *Id.* at 5.

16. *Id.*

17. *Id.* at x.

18. *Id.* at 258.

19. *Id.*

20. *Id.*

common dialogue of rational secular morality.”²¹ We are all in it together and must tread carefully, respecting each other’s beliefs while striving toward a shared moral language.

Kent has a brilliant mind, as many a student evaluation will attest. The intimate look offered in this brief Tribute, largely drawn from just one of his many books, illuminates some of his other notable traits: his generosity, his integrity, and his kindness.

Kent not infrequently comes to a workshop having read the presenter’s draft so closely that he can point out even the smallest mistake in reasoning. His meticulousness stems not only from his rigor and earnestness as a scholar, but from his generosity as a colleague. He wants everyone around him to be a clearer thinker and writer. His ardent pursuit of what’s right and correct, delivered with his characteristic grace and kindness, typically becomes more gift than challenge.

I conclude with some words from his students. Describing Kent as “a fantastic teacher,” one observes, “[h]is greatest strength is his ability to probe students and point out weaknesses in arguments without being aggressive or critical. However, he also never lets a comment pass that is partly thought through. He is really engaged in testing students and improving their thinking.”²² And another writes, “Professor Greenawalt is the ideal law school professor. He knows everything, indulges your ideas, encourages interesting discussion, and has an academic spirit that inspires you to think harder, do more, and study better.”²³ It is an honor to be his colleague and his friend.

21. *Id.* (emphasis added).

22. Columbia Law Sch., Seminar on Legal Interpretation, Course Evaluations, Fall 2014 (on file with the *Columbia Law Review*).

23. Columbia Law Sch., Seminar on Legal Interpretation, Course Evaluations, Fall 2007 (on file with the *Columbia Law Review*).

PROFESSOR GREENAWALT'S UNFASHIONABLE IDEA

H. Jefferson Powell*

To understand why Kent Greenawalt is a legal scholar of the first order, we need to grasp just how completely indifferent he has been to the intellectual fashions of the day. The man is a closet radical. Beneath a personal congeniality and a generous courtesy to the work of others that are all too unusual in the contemporary legal academy, Professor Greenawalt has shown no respect for assumptions that most of us, in the academy and elsewhere, accept at so deep a level that we seldom need to state or to discuss them. Scholarly contumacy is what I call it, and it is high time Greenawalt is unmasked for the revolutionary he truly is. In order to do so effectively, however, we need first to review what we all know but seldom talk about.

I.

Ever since the Enlightenment, for many intellectuals, religion has seemed peculiarly resistant to thought. It makes factual assertions that are ungrounded, moral demands that are nonnegotiable, social claims that are at one and the same time impossibly parochial and terrifyingly imperialistic. From this perspective, religion is a, or even *the*, great antagonist of the cool, dispassionate, universal Reason that is and was the great Enlightenment ideal. The perception that eighteenth-century rationalism was at war with fundamentally irrational religious commitments was itself already a common idea in the era of the philosophes. In August 1739, the distinguished English philosopher Joseph Butler rebuked the famous evangelist John Wesley: "Sir, the pretending to extraordinary revelations and gifts of the Holy Ghost is a horrid thing, a very horrid thing."¹ To be sure, Butler was himself a devout Christian (in fact, a bishop of the Church of England), and his objection to Wesley's preaching stemmed, in part, from intramural Anglican disagreements over church order.² But as Butler's overheated language suggested, underneath Butler's starchy concern for episcopal authority lay his horrified fear that Wesley and those like him were simply providing evidence for

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1. Immense, Unfathomed, Unconfined 258 (Sean Winter ed., 2013). Butler did important work in ethics and the philosophy of mind and identity; his *Analogy of Religion, Natural and Revealed* was an influential defense of the rationality of orthodox Christianity. On Butler's continuing relevance in moral philosophy, see, e.g., Tom Regan, Moore's Use of Butler's Maxim, 16 J. Value Inquiry 153, 159 (1982) (discussing Butler's influence in twentieth century moral philosophy).

2. Wesley was not the antirational religious zealot Butler feared, and Butler was not the vaguely Deistic ecclesiastical politician eighteenth-century English bishops are sometimes thought to have been.

the assertion that religion is, in the end, an irrational phenomenon: One can make sense of religion (in terms of history or politics or superstition or what we now would call anthropology or psychology), but one cannot make sense with or in religion. Religious claims, on this view, simply can't be fit into rational discourse.

In a strangely parallel fashion, for many intellectuals—at least in American law schools—the law itself has come to seem similarly resistant to thought in the wake of what I suppose we must call postmodernism. This is a highly significant (if vastly understudied) development in recent American intellectual history. In early modernity, common lawyers understood the art and science of which they were masters to be a species of rational inquiry so clearly intertwined that law and reason could hardly be distinguished: As Lord Coke famously claimed, “[r]eason is the life of the law; nay, the common law itselfe is nothing else but reason.”³ In many types of social controversy, to put the matter a little less exuberantly, legal analysis and argument are the tools of choice, on Coke's view, if we wish to resolve a controversy through reason rather than brute force. Coke's law, unlike the irrational religiosity Bishop Butler feared, is the ally and servant of reason.

Lord Coke is dead, alas, and his successors, many of them, have quietly disavowed their inheritance. Why they have done so is not always clear. It has long been obvious that there are dangers inherent in Coke's equation of law and reason. As Justice Holmes and many others have pointed out, the “reason” of the law can ossify into a self-contained conceptual system of abstractions and generalizations that lose touch with reality and in particular with the social goods that the legal system exists to serve.⁴ “We must think things not words,” as Holmes put it, “or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.”⁵ Legal concepts should be means to the end of understanding the realities of the social world and addressing its problems, not mystifications or blinders.⁶

Holmes's intent was to criticize and thus correct a maldevelopment in legal reasoning, not to jettison the ideal of law as reason altogether.⁷

3. Edward Coke, *The First Part of the Institutes of the Laws of England* *97b (1628).

4. See, e.g., Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 *Harv. L. Rev.* 443, 460 (1899) (distinguishing teaching legal “dogma” from inquiry into “the real justification of a rule of law [which] is that it helps to bring about a social end which we desire”).

5. *Id.*

6. Holmes's great line about the life of the law opposes “experience” (engagement with social reality) to “logic” (disengaged conceptualism of the sort he equated with Dean Langdell), not to the “reason” that the common lawyers at their best aspired to follow.

7. See, e.g., the peroration at the close of Holmes's *Path of the Law*, with its invocation of “the command of ideas” as the greatest ambition in the law: “It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.” Oliver W. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 478

But just such a retreat from Coke's equation underlies much that has happened in the legal academy and, what is equally to the point, in the jurisprudence of the United States Supreme Court, over the past few decades. Many academics have come to think of traditional legal reasoning much the same way that an Enlightenment Deist thought of traditional religion, an anti-intellectual fraud to be seen through, not thought with. Law, traditional legal thought, isn't reason—it's obfuscation. The Justices, who don't have an academic's luxury of turning to other and more fashionable intellectual pursuits, increasingly show signs that they are giving up on many of the traditional tools of legal thought and decision—precedent, analogy, normative argument—and turning to other means of executing their duty to reach reasonable decisions.⁸

Nowhere have the effects been clearer from the slow erosion of implicit confidence in the traditional tools of their own trade than in the Justices' decisions involving the Establishment and Free Exercise Clauses of the First Amendment. This is hardly surprising. In the post-Enlightenment world of Supreme Court jurisprudence, the Enlightenment difficulty with fitting the claims of religion into any rational framework was always going to make decisions under the religion clauses difficult. For example, a quarter century ago, Michael Sandel described the Court's religion clause jurisprudence as an attempt to assimilate the idea of religious liberty into an ostensibly rational framework in which liberty is understood as protected by governmental neutrality toward individual preferences. As Sandel persuasively argued, religion is precisely *not* a matter of choice for (many) religious people, and treating it as such "confuses the pursuit of preferences with the exercise of duties" when dealing with "persons bound by [religious] duties they have not chosen."⁹ If Sandel's overall analysis was correct, the Court's modern religion clause case law got off on the wrong foot and needed a significant course correction if it was to fulfill the constitutional premise of religious freedom. Traditional legal reasoning allows for the possibility of such missteps and provides avenues for correction, but in an age where professors and Justices alike have lost confidence in the reason of the law, one might suspect that the Court would find it well-nigh impossible to find the path of reason in dealing with religion.

And so it has proved. The law of the religion clauses, almost everyone agrees, is a mess. For almost forty years the Supreme Court ostensibly enforced the Free Exercise Clause by applying the compelling interest test—and a form of judicial scrutiny that in other contexts nearly always proves fatal to the action under scrutiny proved (inexplicably) less strin-

(1897). Now is not the occasion to debate anyone inclined to dismiss Holmes's language as a mere rhetorical flourish.

8. As yet the members of the Court haven't turned up any compelling alternatives, in my judgment, but that too is a debate for another day.

9. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in *Articles of Faith, Articles of Peace* 91, 92 (1990).

gent when religious free exercise was at stake. In 1990, the Court executed an abrupt, if rhetorical, about-face and reduced free exercise analysis to a form of discrete-and-insular minority review with very little practical significance.¹⁰ The *Smith* decision achieved doctrinal coherence (the Court's rhetoric now matches the predictable results) at the expense of draining the principle of free exercise of any independent significance;¹¹ in its inability even to comprehend "the special concern of religious liberty with the claims of conscientiously encumbered selves,"¹² the *Smith* majority betrayed its underlying assumption that religious commitments are inherently arational.¹³

The tale of modern Establishment Clause doctrine is more complicated but, in the end, no less depressing. In 1971, the Supreme Court announced in *Lemon v. Kurtzman* a three-party inquiry as a means of analyzing Establishment Clause cases.¹⁴ *Lemon* reflected the penchant of its era for multifactor "tests" that promised more analytical clarity than they could deliver, but subsequent decisions substituted palpable anarchy for illusory precision. Without ever overruling or doing much in the way of modifying the "*Lemon* test," the Court has vacillated—often without even acknowledging the fact—among *Lemon*, variations based on the different prongs of *Lemon*, and entirely distinct approaches to Establishment Clause analysis, some of which are quite inconsistent with *Lemon*.¹⁵ In 1993, Justice Scalia observed that a majority of the then-

10. Compare *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (applying "compelling state interest" test in First Amendment analysis), with *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 883–90 (1990) (deeming "compelling interest" inapplicable to prohibition at issue and questioning its validity generally). The political branches reacted to this judicial deletion of a constitutional provision by enacting a statute intended to restore the compelling interest test, but a Court badly divided over *Smith* found common ground in the proposition that Congress can't overrule the Court. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act as applied to states). For a demonstration that the Act did no such thing in the constitutionally objectionable sense, see *Sasnett v. Sullivan*, 91 F.3d 1018, 1020–21 (7th Cir. 1996) (Posner, C.J.), vacated, 521 U.S. 1114 (1997).

11. Professor Greenawalt has written that "despite its protestations that it is faithful to prior principles and will have little practical effect, [*Smith*] performs radical surgery on the scope of free exercise claims." 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 442 (2006) [hereinafter Greenawalt, *Free Exercise and Fairness*].

12. Sandel, *supra* note 9, at 91.

13. This assumption, particularly when it remains at the level of unquestioned assumption, is perfectly compatible with religious commitments on the part of those who hold it. Not all religious people agree with Bishop Butler that reason and true religion are and must be ultimately compatible.

14. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) ("Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (internal citations omitted))

15. For a recent, and admirably sardonic, summary of the incoherence of the Court's case law, along with its confusing effects on the lower courts, see *Utah Highway Patrol*

sitting Justices had rejected *Lemon*'s authority, but nevertheless, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence."¹⁶ A quarter-century later, a majority of the Court—perhaps by now amounting to a consensus of the Justices—continues to agree that *Lemon* is inadequate, but the Court continues to invoke it as controlling—sometimes.¹⁷ Opinions that invoke *Lemon* under these circumstances inevitably have the feel of verbal compromises intended to paper over conflicting and inconsistent views on how the Court should address Establishment Clause issues.¹⁸ One might try to excuse these inconsistencies by pointing to the fact that the decisions of a multimember Court will inevitably reflect the differing jurisprudential views of its members, but this explanation rests on the assumption (a correct one, I think) that the Justices have lost faith in the power of traditional legal reason to resolve difficult issues.¹⁹ Judges in the law-is-reason tradition of Lord Coke—and Justice Holmes—would have recognized an obligation to serve “the integrative and rationalizing

Assoc. v. Am. Atheists, Inc., 132 S. Ct. 12, 14–20 (2011) (Thomas, J., dissenting from denial of cert.) (“Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases . . . lower courts have understandably expressed confusion.”).

16. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

17. See *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859–66 (2005) (applying *Lemon*'s three-part test for determining secular purpose). On the same day, and in a case involving the same basic question (does a governmental display of the Ten Commandments violate the Establishment Clause?), the lead opinion concluded that “[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument.” *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (Rehnquist, C.J.) (plurality opinion).

18. In *Van Orden*, Chief Justice Rehnquist noted that “[m]any of our recent cases simply have not applied the *Lemon* test [while] [o]thers have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.” 545 U.S. at 686.

19. It is striking that the most methodologically self-conscious of the current Justices endorse approaches to the Establishment Clause that eschew traditional legal reasoning altogether. Justice Thomas, for example, rejects any application-by-analogy of the Establishment Clause to issues not within the original meaning of “establishment” as he perceives that meaning, i.e., “coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” *Id.* at 693 (Thomas, J., concurring) (citation omitted); see also *Utah Highway Patrol Assoc.*, 132 S. Ct. at 16 (Thomas, J., dissenting from denial of cert.) (criticizing “superficiality and irrationality of a jurisprudence meant to assess whether government has made a law ‘respecting an establishment of religion’”). Justice Breyer is similarly critical of “any set of formulaic tests” for resolving difficult Establishment Clause cases, but for Thomas’s positivist originalism, Breyer proposes to substitute a fact-and-consequences-driven judgment based on his “consideration of the basic purposes of the . . . Religion Clauses” as he perceives those purposes. *Van Orden*, 545 U.S. at 702–04 (Breyer, J., concurring in the judgment); see also *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1839–41 (2014) (Breyer, J., dissenting) (discussing five “factors that I believe underlie the conclusion that, on the particular facts of this case . . . [h]aving applied my legal judgment to the relevant facts”).

functions of doctrinal analysis” rather than permitting Establishment Clause doctrine to descend into chaos.²⁰ For postmodern judges who have seen through the forms of the law, there is no such obligation, and *our* postmodern Justices have accordingly gone on to other modes of decision.

A subject for decision, religion, that is intrinsically beyond reason. An empty language of decision, law, that ultimately masks reasoning based on other considerations—history, empirical sociology, economics, etc., as the decisionmaker finds most persuasive. Who would be so intellectually obstreperous as to suggest that we tackle conflicts involving religion by thinking about them within the internal rationality of the law? The idea is positively medieval and quite contrary to the spirit of our age. It would take a remarkably bold (not to mention rebellious) individual to undertake such a project. Enter Professor Greenawalt, who has been pursuing, with marvelous success, exactly that project for many years.²¹

II.

Kent Greenawalt has always taken a broad view of what legal scholarship can and often should involve. Even in his early work, the overlap between legal and moral concerns was an important theme. Early articles addressed substantive themes such as civil disobedience, moral obligation and the law, and specific issues such as the legal and ethical significance of silence, while other pieces displayed his ability to write in jurisprudence and analytical philosophy.²² Eventually the big books in this vein followed—legal and moral conflict, the idea of objectivity in law, and the value for law of interpretive theory²³—while other work applied Greenawalt’s philosophical and legal expertise to the difficult questions raised by the Constitution’s guaranty of freedom of expression.²⁴ Ordinary mortals would have viewed these endeavors as enough to fill a couple of CVs,²⁵ but if Greenawalt had stopped here, he might not have

20. Charles Fried, *Foreword: Revolutions?*, 109 *Harv. L. Rev.* 13, 70 (1995).

21. As I acknowledge just below, religion and law is not the only subject in Professor Greenawalt’s extensive oeuvre.

22. E.g., Kent Greenawalt, *A Contextual Approach to Disobedience*, 70 *Colum. L. Rev.* 48 (1970); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *Colum. L. Rev.* 982 (1978); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 *Colum. L. Rev.* 1167 (1983); Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 *Wm. & Mary L. Rev.* 15, 19 (1981).

23. Kent Greenawalt, *Conflicts of Law and Morality* (1987); Kent Greenawalt, *Law and Objectivity* (1992); Kent Greenawalt, *Legal Interpretation: Perspectives from Other Disciplines and Private Texts* (2010).

24. E.g., Kent Greenawalt, *Fighting Words* (1995); Kent Greenawalt, *Speech, Crime and the Uses of Language* (1989); Kent Greenawalt, *Viewpoints from Olympus*, 96 *Colum. L. Rev.* 697 (1996).

25. I will not try to convict Professor Greenawalt of prolixity by citing any of his excellent work on criminal law topics unrelated to free speech.

been able to show that he was other than tireless and extremely gifted. Adding a long and illustrious series of articles, essays, and books on the legal and political issues raised by religious commitment was not just a natural extension of his other interests.²⁶ Doing so enabled him to bring out into the open his insouciant disregard for the common wisdom of the era: Greenawalt, it seems, did not get the memo that law isn't reason and religion can't be dealt with reasonably. Instead, he went about proving both convictions dead wrong.²⁷

Let us start with Professor Greenawalt's approach to religion. In contrast to the high Court (as both Professor Sandel and I would read its decisions), Greenawalt does not attempt to assimilate religious commitments to the model (ultimately economic) of individual personal preferences of a nonrational character. Greenawalt understands that for many (probably most) people for whom religion is significant, their religious commitments and convictions are not choices that they could have made otherwise, and might decide to change tomorrow: The claims of religion are instead obligations that encumber and define the self and that cannot be set aside without serious injury.²⁸ That is not because he would exclude from constitutional or political consideration those elements of religious commitment or practice that do not meet some external, rationalistic criterion of acceptability: Religion typically involves a mixture of rational and nonrational elements . . . but then such a mixture is characteristic of human thought and action more generally, whether or not a given individual is religious.²⁹ The nonrational aspect of religious

26. As with other topics, I make no effort to list all the work. The articles are early and late. E.g., Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753 (1984); Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 21 J. Contemp. Legal Issues 449 (2013). As for the books, see Kent Greenawalt, *Does God Belong in Public Schools?* (2007); Kent Greenawalt, *Private Consciences and Public Reasons* (1995); 2 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (2008) [hereinafter *Greenawalt, Establishment and Fairness*]; Greenawalt, *Free Exercise and Fairness*, supra note 11; Kent Greenawalt, *Religious Consciences and Political Choice* (1991).

27. I shall not attempt to trace developments in Professor Greenawalt's thought about religion or law, not because his thinking has remained static, but because his work for many years has displayed the admirable characteristics I discuss.

28. Greenawalt often acknowledges this important point, both in general and with respect to specific issues. See, e.g., *Greenawalt, Establishment and Fairness*, supra note 26, at 139 (discussing why "[it] is not hard to see" certain Christians' objections to theory of evolution); *Greenawalt, Free Exercise and Fairness*, supra note 11, at 439 (referring to "widespread sense that one's religious obligations are more ultimate than those of the social order"); Kent Greenawalt, *Religion and Public Reasons: Making Laws and Evaluating Candidates*, 27 J.L. & Pol. 387, 405 (2012) ("For many people, their religious convictions and affiliation are an important part of who they are.").

29. See, e.g., Kent Greenawalt, *Religiously Based Judgments and Discourse in Political Life*, 22 St. John's J. Legal Comment. 445, 460, 480 (2007) ("In much of what we believe, rational understanding, however that is conceived, intertwines with other assumptions In making up their minds about [a difficult legal or moral issue] everybody will rely to an extent on nonrational (I do not say irrational) intuitions.").

commitment does not place it beyond the scope of reasoned discussion, in part because everyone draws on such nonrational sources of belief and action.

At the same time, Greenawalt refuses to convert “religion” into a synonym for whatever are a person’s deepest moral convictions, an intellectual sleight of hand that makes all positions into “religious” ones and thereby drains the religion clauses of independent significance.³⁰ The result is that we can reason from a clear-headed understanding of the nature of religious commitment to conclusions about its role in a diverse and liberal society.

I think the sense of obligation to an entity beyond oneself that is so important for most religious believers is a powerful enough reason to warrant giving legal protection to some religious claims of conscience that do not involve moral conclusions, while protection is denied for nonreligious, nonmoral claims. No reason comparable to the believer’s sense of obligation to a higher authority applies when a nonbeliever’s sense of what the nonbeliever should do is outside the realm of morality.³¹

In Professor Greenawalt’s world, argument over how far the political community can accommodate the distinctive needs of religious people and about the extent to which it cannot do so does not take us outside the realm of reasoned discussion.

What about reason and the law? The evidence is clear: Professor Greenawalt is an unabashed reactionary, a true disciple of Lord Coke, even if his erudition, his analytical sophistication, and his fair-minded presentation of opposing arguments tend to disguise the fact. A few years ago, Greenawalt conceded that his “own position about constitutional interpretation [was] fairly labeled ‘eclectic.’ I believe a range of considerations are relevant besides original understanding, however that is conceived, and that no neat ordering or precise method of weighing can be assigned.”³² But the adjective is misleading to the extent that it suggests

30. See, for example, Greenawalt’s careful discussion of how far to extend the scope of “religion,” Greenawalt, *Free Exercise and Fairness*, *supra* note 11, at 129–56, and his conclusion that

refus[ing] to conflate religion and conscience is not only the most sound in terms of constitutional language, it also allows a nuanced evaluation of constitutional claims for equality. Concerns about equality that have led some scholars to a very broad constitutional definition of religion can better be handled by more discrete inquiries about equal treatment.

Id. at 156.

31. Kent Greenawalt, *The Significance of Conscience*, 47 *San Diego L. Rev.* 901, 916 (2010).

32. Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 *San Diego L. Rev.* 1131, 1142 (2010) [hereinafter Greenawalt, *Fundamental Questions*]; see also Kent Greenawalt, *How Does “Equal Liberty” Fare in Relation to Other Approaches to the Religion Clauses?*, 85 *Tex. L. Rev.* 1217, 1218 (2007) (referring to “the more eclectic approach I support” in religion clause analysis). In an early essay, Greenawalt identified a “moderate and eclectic” approach to

that Greenawalt adopts an ad hoc, all-things-considered approach to the analysis of religion clause issues. What Greenawalt means by the modest word “eclectic” is that in addressing a constitutional question he employs the full range of traditional legal tools,³³ seeking the answer that makes the best sense of the positive legal authorities that are relevant in light of what he takes to be the fundamental purposes of the constitutional text.³⁴

Greenawalt, furthermore, has expressed his adherence to Coke’s high vision of law in the most dramatic academic fashion imaginable for someone writing on constitutional issues. We live in an era in which elite law professors tend to think of the doctrinal treatise as either impossible (there is too little agreement to make a treatise intellectually cohesive) or pedestrian (the law being essentially empty).³⁵ But after years of important work on the ethical, political, and social problems raised by religious commitments in a liberal society, much of it more easily treated as moral philosophy or political theory rather than law, Greenawalt’s magnum opus on the subject is a treatise on the constitutional law of the religion clauses. In Greenawalt’s hands, theories (his own as well as those of others) have become the servant of his analysis of specific cases and

legal decisionmaking with Cardozo and the mainstream of American jurisprudential thought. Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 Colum. L. Rev. 359, 359 (1975).

33. As Greenawalt recently put it,

[a]mong the relevant considerations beyond the applicable constitutional text [that he considers] are prior legal decisions and the principles they announce, traditions within the country, contemporary values and understandings, the implications of fundamental principles, and the desirability of standards that can give relatively clear guidance to judges and to citizens.

Greenawalt, *Fundamental Questions*, supra note 32, at 1142–43. Unlike contemporary constitutionalists who believe that the “correct” approach to constitutional questions generates incontestably correct answers, Greenawalt recognizes that there is no algorithm for decision. “Whether my conclusions are defensible or not, the basis for them is my conviction that all the factors are relevant.” *Id.*

34. Greenawalt has specifically rejected the criticism that his approach excludes the consideration of normative and purposive considerations. See Greenawalt, *Fundamental Questions*, supra note 32, at 1147 & n.32. See, for example, Professor Greenawalt’s persuasive analysis of the argument that the First Amendment requires a more absolute priest–penitent privilege than may be constitutionally acceptable with respect to other confidential disclosures, *Free Exercise and Fairness*, supra note 11, at 246–60, and his sensitive discussion of the Supreme Court’s decision in *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 690 (1994) (holding state violated Establishment Clause by creating special school district defined geographically but designed to confer governmental power on a religious community). See Greenawalt, *Establishment and Fairness*, supra 26, at 224–236 (concluding decision was correct). I agree with him on the privilege issue and am not persuaded by his, or the Justices’, arguments about *Kiryas Joel*; one of the great pleasures of reading Greenawalt’s work is that his invariably fair-minded presentation of the issues and arguments actually enables the unpersuaded reader to identify the source of his or her disagreement.

35. On the former rationale, see Professor Tribe’s apologia for abandoning work on the third edition of his treatise, Laurence H. Tribe, *The Treatise Power*, 8 Green Bag 2d 291 (2005). The decline in prestige of the doctrinal treatise generally is a commonplace.

issues that make up the law, and his goal of providing a rationale, in the most persuasive manner possible, of the positive legal authorities.³⁶ This is work in the classical common law tradition: As Coke put it, “[t]he reporting of particular cases or examples . . . is the most perspicuous course of tracing the right rule and reason of the law’ Law is practice, not a theoretical representation of it.”³⁷ Rather than substituting “theory” or “empirical research” for work *within* the law as a practice, as so much “cutting-edge” scholarship seeks to do, Greenawalt has embraced it, confident that legal thought provides an adequate tool for bringing reason to bear on the political and social issues raised by religion.

Only a bold scholar would dare to be so unfashionable, but Professor Greenawalt’s recent work doubles down on the commitment to the law as reason underpinning his treatise on the religion clauses. I do not have time to indicate how that same commitment is at work in his important book on legal reasoning and statutory construction,³⁸ and I have only had the chance to read in manuscript his fascinating, forthcoming general treatment of constitutional decisionmaking. But like many others who have benefited from Greenawalt’s wise counsel, I can testify to another sense in which Greenawalt is unfashionably rooted in legal tradition. The old common lawyers thought of themselves as exercising a form of “reasoning . . . decisively shaped by the fact that it [was] designed to be presented in a public forum in which the reasoning is open to explicit challenge.”³⁹ Rather than relying on a system of authoritarian pronouncements based on incontestable premises, “the practitioner of this art of reasoning [was to] strive for common judgment in the face of dispute and disagreement.”⁴⁰ Legal thought, in other words, was a common, shared activity, and the goal of argument was understanding and, where possible, agreement. No doubt this was an ideal often honored in the breach. But for Kent Greenawalt, practitioner of the arts of charitable interpretation and painstaking attention to the work of others, the ideal is a reality that he embodies, in his work and in his person.

36. See Greenawalt, *Establishment and Fairness*, *supra* note 26, at 543 (describing “burden” of treatise as one of inquiring into “just how the religion clauses . . . should best be understood” by “[a]sking questions about that understanding, not in the abstract but by focusing on concrete issues in context”).

37. Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 *Oxford Univ. Commonwealth L.J.* 1, 6 (2003) (quoting volume 6 of Coke’s Reports).

38. Kent Greenawalt, *Statutory and Common Law Interpretation* (2012).

39. Postema, *supra* note 37, at 8.

40. *Id.*

RIGOROUS REFLECTION FUELED BY LOVE: KENT GREENAWALT'S GIFTS TO FUTURE GENERATIONS

*Susan P. Sturm**

Over the years, I have gotten to know Kent Greenawalt as a roommate and colleague. We chat frequently, often briefly, as he passes my door to and from his office three doors down from mine. Those conversations, though seemingly quotidian, have become quite meaningful to me. They often involve some aspect of our well-being, and have interwoven throughout an unspoken but palpable spirit of mutual respect and appreciation for the significance of many dimensions of our lives, particularly our families, our weekends, and our rhythms of work. Those routine interactions have built an almost taken-for-granted yet strong connection, one I deeply value.

I also have come to know Kent through his consistent and thoughtful participation in faculty workshops. Kent reads papers with both an appreciative and critical eye. He often refers to a page in the draft that contains a crucial but underdeveloped point, and poses a question that is brilliant in its simplicity, and that sits at the vital intersection of the strength and the weakness of the paper. He does not let anyone off the hook, in a way that pushes you to be clear about what you mean, as well as what meaning there is in what you say. He manages to marry tough-mindedness with deep appreciation and humanity. I, like many of my colleagues, listen with anticipation to Kent's fierce yet gentle comments that have done so much to build a vibrant intellectual community at Columbia Law School.

I myself was a grateful recipient of Kent's generous and thoughtful feedback on a paper I presented at a faculty workshop. That paper, tentatively titled *Diversity and Beyond*, surfaced yet another point of connection with Kent—a shared concern with how to address race in higher education. Kent's 1975 article entitled *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*,¹ was quoted by the Supreme Court in *Fisher v. University of Texas*.² Kent was prescient in his concern about the hazards of pushing underground the racial discourse necessary to address enduring racial inequality, and the critical role of the Supreme Court in creating an environment that will make difficult issues discussable. He ends his article with a plea for the Court to frame its jurisprudence with this value at the core:

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1. Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559 (1975) [hereinafter Greenawalt, *Racial Preference*].

2. 133 S. Ct. 2411, 2420 (2013).

[W]hatever pain honest and open analysis may cause may be less serious than the dangers of further covertness and delusion. Honest judicial confrontation with difficult legal issues is not always the best policy, but it *almost* always is; in the absence of an unanswerable argument for hypocrisy, the Court should proceed in this area, as in others, on the assumption that open evaluation of conflicting claims is its responsibility.³

Through these interactions, I have seen that Kent brings an unusual level of decency, dignity, and depth to everyday interaction as well as to the scholarly enterprise.

Given my deep respect for him as a person and a scholar, I seized on the opportunity to reflect on Kent's life and work as part of *Columbia Law Review's* tribute to Professor Greenawalt's fifty years at Columbia. I wanted to be able to convey the interconnectedness of Kent's deep commitments to human values and family and his laser-like intellect. I asked Kent to provide some more context about his relationships with family and students. In response to my questions, Kent decided to share with me a manuscript entitled "Recollections of Sanja (July 7, 1939–November 3, 1988)."⁴ Kent began writing this manuscript about his late wife less than a month after she died, and finished it the following summer. He wrote it for "future members" of his family, about "things I would want to tell children-in-law and grandchildren."⁵ Its aim was to serve as "some hedge for those of us graced by Sanja's love against the erosion of our memories."⁶

By bestowing on me the honor of sharing this deeply personal manuscript, Kent turned my writing of this Tribute into a labor of love. I had the opportunity to get to know Sanja through Kent's eyes, and in the process to know Kent on a newer and deeper level. I got to see up close how Kent used his capacity to write clearly and honestly, with deep sensitivity, erudition, and rigor animated by a commitment to relationships, to give an invaluable gift to his family. He used language, memory, and narrative to build a relationship across generations with a person who was a great love in his life.

It is powerful to have read this manuscript from the point of view of his intended audience—his children and their children. Through this lens, I learned much about Kent as a person, a thinker, a writer, and a man. The manuscript is living proof of Kent's effort to use the power of words to build relationships and learn from the experiences and insights of others. I also saw concretely in the writing of this deeply personal reflection the qualities that I so admire in Kent's more professional writing and interaction.

3. Greenawalt, *Racial Preference*, supra note 1, at 602.

4. Kent Greenawalt, *Recollections of Sanja 1* (July 7, 1939–November 3, 1988) (unpublished manuscript) (on file with the *Columbia Law Review*).

5. *Id.*

6. *Id.*

From the very first page of the manuscript, I imagined Kent in conversation with future generations about Sanja, using her words and stories wherever possible. Indeed, the reflection was launched as the result of an interaction between Kent and one of his sons the night after Sanja's death. His son expressed sadness that his children would not know Sanja personally. Kent undertook to do what he could to fill that gap by writing.

I can imagine Kent asking himself the question, what would Sanja's and my grandchildren want to know? What is important that they know? How can I do justice to a person whose deepest values were about how she made other people feel? The range of topics—family, history, relationships, sports, religion, food, dress, conflict, friendship, work, culture—provides life lessons in how to navigate the big and small challenges and transitions life puts in your path. Kent combines details—where her parents were born and grew up and where she herself grew up (mainly the coastal city of Opatija; family composition across the generations) with important turning points and junctures (sources of conflict, marriage, giving birth, family illnesses, and building new relationships). His stories relate to the kinds of things you wished you knew about your family and the things that you are likely to pass on to the next generation whether you want to or not. He also shows how language and history figured so prominently in Sanja's circumstances and choices.

The stories Kent tells are rooted in history, but also set up to convey symbols of Sanja's life, stories that exemplify the essence of who Sanja was. "The main sport of Sanya's life was skiing, and one could in a way chart the stages of her life by her skiing memories and experiences."⁷ Kent also tells a story about Sanja as a toddler in 1941 during the war, when her family was interned along with those of other diplomats.

[Sanja] crossed a forbidden boundary line and embraced a German boy, leading a famous Yugoslav poet, Ivo Andric, who was also an [interned] diplomat, to write of how much better the world would be if adults could follow her example. I have come to think of this incident as a kind of symbol of Sanja's life; she always reached out to others warmly and positively and without design or ulterior objectives.⁸

Kent's narrative speaks to people at different stages of life: childhood, adolescence, contemplating marriage, having children, dealing with building a new extended family, illness, crisis, and death. He grapples openly and honestly with hard questions, and does not sugar-coat the difficulties that inevitably have to be faced, even in moments often imagined to be only joyful. His stories provide insight into some of the biggest challenges and obstacles to forming the relationship that became so central to his happiness and identity. He also provides names of people, places, restaurants, and events that figured prominently along

7. *Id.* at 103.

8. *Id.* at 4.

the way, dropping breadcrumbs that future generations could use as sources of further insight and experience. Kent's narrative also keeps historical memory alive—what it was like during the war, how history and politics concretely affected the family's economic situation.

Kent is very open in the manuscript about his own biases and preconceptions about relationships, gender, family, and culture, and how they affected his interactions. He identifies sources of conflict that are simultaneously the fuel of learning and connection. He humanizes himself—as well as those he cares so deeply about—for his children and grandchildren, by revealing his own vulnerabilities and foibles, and most importantly, how he learned and grew in his own relationship with Sanja. His willingness to reflect openly about himself invites the reader to follow suit.

Kent's methodology in pulling together and telling Sanja's story embodies his commitment to transparency and intellectual integrity. The manuscript is scrupulously accountable and frank about the possibility that Kent's relationship with Sanja will "lovingly bias" his telling of her story.⁹ In Kent's words, he is continually "mixing roughly temporal accounts of past events with subjects of continuing significance in our lives, incidents in our lives, and my own feelings."¹⁰ He is ever-conscious of how "these feelings deeply color all I say."¹¹ He invites others to critically engage with his telling of the story.¹² The manuscript has an extraordinary combination of rigor, attention to detail, dispassion, and deep emotion. This level of transparency and rigor of method, here applied to be persuasive to his future family members, is also evident in the way he approaches texts in his scholarly work.

Above all, the manuscript makes so clear the importance of relationships in our struggle to make meaning of our lives. He conveys such a strong sense of the simplicity and depth of love, how it enriches our lives, and how love transforms us and enables us to be our best selves. The dispassionate and straightforward style of the manuscript, even as it is full of emotion, makes its commitment to values and relationships all the more accessible.

The audiences for Kent's manuscript could not be more different from those he seeks to reach with his scholarship. Yet, the common threads define so powerfully Kent's character, humanity, and impact. I am struck by Kent's willingness to put into practice the value of enduring the "pain" of "honest and open analysis" he calls upon the Supreme Court to uphold, albeit in a different context where relationships of trust have to be cultivated.¹³ Kent undertook a self-imposed process of rig-

9. *Id.* at 2.

10. *Id.*

11. *Id.*

12. *Id.* at 114.

13. Greenawalt, *Racial Preference*, *supra* note 1, at 602.

orous reflection, transparency, honesty, and integrity in dialogue with the people who are most important to him. I, like so many others including students and colleagues, so deeply value and benefit from the presence and contributions that flow from Kent's extraordinary combination of rigor and humanity.

MY FRIEND, THE PHILOSOPHER

William F. Young*

I write first of Professor Greenawalt, the scholar, and then of Kent, the man. I know the scholarship best through the books, *Free Exercise and Fairness* and *Establishment and Fairness*, together making up *Religion and the Constitution*.¹

Some confessions are in order. First, I do not profess to be impartial; over the decades of our acquaintance Kent has conferred many kindnesses on me. I confess further to having thought that, in this country and this century, antidisestablishmentarianism is about as fierce a foe as Ozymandias.² I have been disabused of that error, however. In our culture, “scholars, lawyers, and laypersons ask themselves from time to time just how the religion clauses of our Constitution should best be understood.”³

Greenawalt’s answer incorporates both grace notes⁴ and a swelling diapason of political philosophy. It brings to mind this passage from a notable critic of literature:

[T]he best way to promote profitable discussion is to be as clear as possible with oneself about what one sees and judges, to try and establish the essential discriminations in the given field of interest, and to state them as clearly as one can (for disagreement if necessary).⁵

That describes what, at the least, Greenawalt has accomplished. Whether deliberately or not, he reveals a dichotomy in the mind of Chief Justice Burger about the meaning of “religion.” In *Wisconsin v. Yoder*, Burger

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1. 2 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (2008) [hereinafter Greenawalt, *Establishment and Fairness*]; 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (2006) [hereinafter Greenawalt, *Free Exercise and Fairness*].

2. Ramesses II, of the Nineteenth Dynasty of Egypt, as figured in sonnets by Percy Bysshe Shelley and Horace Smith. Using poetic license, the authors depicted his broken statue as a symbol of departed grandeur. See Percy Bysshe Shelley, *Ozymandias*, *Examiner* (London), Jan. 11, 1818, at 24; Horace Smith, *Ozymandias*, *Examiner* (London), Feb. 1, 1818, at 73.

3. Greenawalt, *Establishment and Fairness*, supra note 1, at 543.

4. A captivating one has to do with the injuries inflicted on a religion by its establishment. As to that, Greenawalt refers to the intrigue in Anthony Trollope’s *Barchester Towers*, which depicts a change in government’s potential influence in clerical appointments, and a son’s efforts to succeed his own dying father as bishop, despite political headwinds. Greenawalt, *Establishment and Fairness*, supra note 1, at 5 n.11. Compare the obsequious Mr. Collins and his patroness, Lady Catherine de Bourgh, in *Pride and Prejudice*. See Jane Austen, *Pride and Prejudice* 65–69 (Penguin Classics 2006) (1813).

5. F.R. Leavis, *The Great Tradition: A Study of the English Novel* 9 (Doubleday 1954) (1948).

spoke of Thoreau's retreat to Walden Pond as a choice "philosophical and personal."⁶ A later opinion dealt with a free exercise claim by one Eddie Thomas.⁷ According to Burger, Thomas's convictions were not the less religious because they were imperfectly articulated. One is left with the suspicion that in Burger's view—a curiously Marxist one—what is religion for the unlettered is philosophy for the enlightened.

And yet, one wishes for more. Regrettably, *Establishment and Fairness* went to press before the opinions of the justices in *Town of Greece v. Galloway* were released.⁸ (On the other hand, Greenawalt is prescient; there is evidence that he anticipated something like the majority conclusion.⁹) One may wish for a discussion of Bronson Alcott's Fruitlands—part government, part religion.¹⁰ And a reference to Anne Hutchinson's banishment from Boston.¹¹ (What of the hypothetical case, *Hutchinson v. Boston Church*?)

Finally, some remarks about Kent's personal qualities. As to those, some things are evident from *Religion and the Constitution*: His habit is to take full account of views differing from his own and to treat them with respect.¹² He does not, as a rule, indulge in a put-down. I know of one instance only of a sharp retort by Kent.¹³ Laying the books aside, my per-

6. 406 U.S. 205, 216 (1972) (contrasting religious claims of Amish petitioners with "philosophical and personal" reasons for Thoreau's seclusion at Walden Pond).

7. That claim had been rejected by the Supreme Court of Indiana, in an opinion that picked up the remark about Thoreau. According to that court, Thomas was "unclear [about] what his belief was, and what the religious basis of his belief was," adding, "The precise belief is not articulated." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 391 N.E.2d 1127, 1133 (Ind. 1979). On review, the Supreme Court set that right in *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981).

8. 134 S. Ct. 1811 (2014). There the majority pronounced a benison on public prayers at town board meetings. See *id.* at 1821–23.

9. See Greenawalt, *Establishment and Fairness*, *supra* note 1, at 86 (anticipating certain views of Chief Justice Roberts and Justice Alito that would produce the exact group of five who voted together—largely—in *Town of Greece*).

10. Bronson Alcott, an educator and writer, founded Fruitlands, a community dedicated to transcendental ideals, in Massachusetts in 1843. According to Alcott's daughter, Louisa May, this endeavor was wholly feckless. See Louisa M. Alcott, *Transcendental Wild Oats* 1569.

11. Anne Hutchinson was a dissident religious leader banished from the Massachusetts Bay Colony in 1638. For a survey of Hutchinson's life, including her trial, banishment, and excommunication, see generally Edith Roelker Curtis, *Anne Hutchinson: A Biography* (1930).

12. For a notable example, see Greenawalt, *Free Exercise and Fairness*, *supra* note 1, at 375–76 (articulating rationale for strict approach to protection of workplace religious speech, in which otherwise protected expression can never "cumulate into violations of Title VII").

13. I know of that from *Free Exercise and Fairness*, *supra* note 1, at 96. There Greenawalt reports having heard from a conference speaker that a citizen cannot be a good Christian if he doesn't know the names of his representatives in four legislative bodies. Greenawalt responded by inquiring how Jesus would have fared had he been given an analogous test. That, in my book, is Acerbity vs. Absurdity. Something softer would have

ception of the man is so unlikely to be objective that I confine myself to an observation about his dealings with colleagues and students. He engages with them seriously—often charitably—and never aggressively. What one sees, commonly, when he notices that an argument being pursued by one or another is headed for a smash-up, is a sparkle in Kent's eyes and a hint of a smile on his face. For anyone who knows him well, that is reproof enough.

been more in character. I suggest the observation, say, that redistricting might lead to widespread excommunications.

