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Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges

Mark B. Greenlee

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Cover Page Footnote

I wish to thank Daniel O. Conkle, Scott C. Idleman, and Jonathan E. Maire for their helpful comments on an early draft of this paper.

ARTICLES

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Mark B. Greenlee[*]

"I don't check my faith at the door when I walk into this institution. I bring my human wisdom, my experience, my knowledge. And, yes, I bring my Bible with me. It's my compass. It's my sense of right and wrong."[1]

I. INTRODUCTION

The permissibility of judges to make references to religious texts, convictions, and beliefs during their decision making process has been debated by judges, lawyers, scholars, and pundits.[2] Many commentators advocate the exclusion of religious texts, convictions, and beliefs from judicial justifications of decisions.[3] Some participants in the debate also seek to exclude such references from judicial deliberations about decisions.[4] Others view dependence upon religious beliefs during the

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 Senior Attorney, Federal Reserve Bank of Cleveland; Allegheny College, B.S. 1980; Capital University, J.D. 1983. The views expressed herein are those of the author and not those of the Federal Reserve Bank of Cleveland. This article begins the task I deferred in a previous article describing appellate court references to Jesus' command to love your neighbor as yourself and exploring the appropriate parameters for reference to religious beliefs in judicial decisions. *See* Mark B. Greenlee, *Echoes of the Love Command in the Halls of Justice*, 12 J.L. & REL. 255 (1995). The instant article ventures beyond the empirical study of the influence of biblical passages on appellate court decisions into the realm of the appropriateness of judicial references to the Bible in the context of criminal sentencing decisions by trial courts. I wish to thank Daniel O. Conkle, Scott C. Idleman, and Jonathan E. Maire for their helpful comments on an early draft of this paper.

[1] Interview with Judge Melba Marsh, *ABC World News Tonight* (ABC television broadcast, Mar. 22, 1999); *The Bible and the Judge* (visited Mar. 23, 1999) <http://www.abcnews.go.com/onair/worldnewstonight/transcripts/wnt990322_judge_trans.html> (on file with the *University of Dayton Law Review*).

[2] *See* Scott C. Idleman, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993); Symposium, *Faith and the Law*, 27 TEX. TECH L. REV. 911 (1996); Symposium, *Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions*, 81 MARQ. L. REV. 177 (1998).

[3] *See, e.g.*, KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 141-150 (1995); Stephen L. Carter, *The Religious Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Mark Modak-Truran, *The Religious Dimension of Judicial Decision Making and the De Facto Disestablishment*, 81 MARQ. L. REV. 255 (1998).

[4] *See* Samuel W. Calhoun, *Conviction Without Imposition: A Response to Professor Greenawalt*, 9 J.L. & REL. 289, 302 (1992).

deliberation and justification process as permissible, even inevitable.[5] Another group would allow them as a last resort in so-called hard cases.[6]

This article focuses on one type of judicial decision: criminal sentencing decisions by trial courts.[7] It argues that religious beliefs exert a powerful directing influence upon the sentencing decisions of judges and that judges should not be barred from referring to religious texts such as the Bible, Talmud, or Koran as they justify their decisions, so long as they act in accord with the norms of the judicial office they hold such as establishing justice, acting with integrity, remaining impartial, considering the arguments of the parties, basing decisions upon admitted evidence, exercising discretion within the bounds of fairness, and accounting for applicable law. Within these limits, judges should be allowed to put their faith into practice on the bench.

This article offers four models of the relationship between religious belief and judicial decision making–the separatist, privatist, publicist, and wholist models–as an analytical tool to highlight the differences in how judges think about the role of religious beliefs in their sentencing decisions. While this article argues that the wholist model provides the best framework for judicial behavior, it does not seek a privileged position for the wholistic model of judicial decision making. Rather, it seeks to provide room for all four models of the relationship between religious belief and judicial decision making to operate within the realm of a sentencing judge's discretion. In other words, the state should not usurp the jurisprudential starting points of its judges. Furthermore, while this article recognizes the influence of the Bible upon American law, it does not argue for a preference for biblical religions. This article defends the religious diversity of the judiciary, finding support for it in the provisions of the United States Constitution barring religious tests for public office, protecting free speech, prohibiting the establishment of religion, and

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[5] *See* Raul A. Gonzalez, *Climbing the Ladder of Success–My Spiritual Journey*, 27 TEX. TECH L. REV. 1139, 1147 (1996); Wendell L. Griffen, *The Case for Religious Values in Judicial Decision Making*, 81 MARQ. L. REV. 513, 518-19 (1998); Jonathan E. Maire, *The Possibility of a Christian Jurisprudence*, 40 AM. J. JURIS. 101, 145-55 (1995).

[6] *See* Idleman, *supra* note 2, at 434, 455; MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 102 (1997).

[7] This article focuses on criminal sentencing by judges. It does not deal with the closely related subject of arguments to juries about sentencing decisions. For opposing views of the propriety of religious references in the context of jury arguments, see Brian C. Duffy, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335 (1997) and Elizabeth A. Brooks, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 GA. L. REV. 1113 (1999).

protecting the free exercise of religion.[8] It seeks to preserve the ability of judges of all faiths to make their faith commitments explicit. In short, the article presents a Golden Rule argument of sorts–equal treatment of judges of all faiths.

The quotation heading this article embodies a wholistic approach to judicial decision making.[9] The words are those of Judge Melba Marsh in defense of her quotation from the Bible while sentencing a child rapist. She made the statement during an interview aired on ABC World News Tonight[10] after an Ohio appellate court ruled that her biblical reference fell outside the parameters of Ohio's sentencing guidelines and violated the defendant's due process rights.[11] On appeal, the Ohio Supreme Court reversed both determinations in *State v. Arnett*.[12] The *Arnett* case will serve as a concrete example for this article's discussion of the proper role of religious beliefs in the sentencing decisions of judges.

II. STATE V. ARNETT

A. Facts

James Arnett pled guilty to ten counts of rape and one count of pandering obscenity involving the daughter of his fiancé.[13] At the sentencing hearing, Judge Marsh described her struggle to determine Mr. Arnett's sentence.[14] She noted the factors that would lead her to impose a lighter sentence, such as his own history of sexual abuse as a child, diagnosis as a pedophile, chemical dependency, and feelings of remorse. She also noted certain factors that would lead her to impose a harsher sentence, such as the heinousness of the offense, the lasting harm he had caused, and the tender age of the victim.[15] She then made the statements that were at issue on appeal:

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[8] *See* U.S. CONST. art. VI, cl. 3 and amend. I.

[9] *See supra* text accompanying note 1.

[10] *See* interview with Judge Melba Marsh, *supra* note 1.

[11] *See* State v. Arnett, Nos. C-980172 & C-980173, 1999 Ohio App. LEXIS 295 (Ohio Ct. App. Feb. 5, 1999).

[12] *See* State v. Arnett, 724 N.E.2d 793 (Ohio 2000).

[13] *See* OHIO REV. CODE ANN. §§ 2907.02(A)(1)(b), 2907.321(A)(5) (Anderson 1999).

[14] *See* tr. at 53.

[15] Tr. at 46-53.

> . . . I was trying to determine in my mind what type of sentence you deserved in this particular case. . . . I was looking for a source, what do I turn to, to make, to make that determination, what sentence you should get. . . And in looking at the final part of my struggle with you, I finally answered my question late at night when I turned to one additional source to help me. . . . And that passage where I had the opportunity to look is Matthew 18:5,6. . . . "But, whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea."[16]

Judge Marsh then sentenced Mr. Arnett to fifty-one years in prison: ten consecutive five-year sentences for rape plus one year for pandering obscenity.[17]

B. Appeals Court

On appeal, the defendant asserted that Judge Marsh acted outside Ohio's sentencing statute and violated his due process rights by basing her decision on her religious beliefs.[18] A majority of the appellate court panel agreed. Addressing the sentencing statute, Judge Painter said:

> Prior to Senate Bill 2, trial courts had virtually unlimited discretion when sentencing an offender. But now a court's discretion is limited by the various statutory factors it must consider. We are constrained to follow the law as enacted by the legislature, even if we disagree with it. Under the Revised Code, the religious beliefs of the trial judge are not a statutory factor that may be considered.[19]

Judge Painter viewed the biblical reference as a *factor* within the meaning of the statute and determined that it was outside the scope of permissible factors.[20]

Turning to due process considerations, Judge Painter relied heavily upon *United States v. Bakker*[21] for his holding:

> Also, when a judge's personal religious views enter into a sentencing procedure, the constitutional rights of the offender may be violated. This

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[16] Tr. at 53. *Matthew* 18:5-6 also has been the subject of controversy when paraphrased by a prosecutor. *See* Commonwealth v. Brown, 711 A.2d 444, 457 (Pa. 1998). It has been quoted with approval, however, in an appellate court. *See* People v. Jagnjic, 447 N.Y.S.2d 439, 443 (N.Y. App. Div. 1982) (Lupiano, J. dissenting).

[17] *See* tr. at 53.

[18] *See Arnett*, 1999 Ohio App. LEXIS 295, at *5.

[19] *Id.* at *4-5.

[20] *See id.* at *6.

[21] 925 F.2d 728 (4th Cir. 1991).

> happened in *United States v. Bakker*, a case decided by the United States Court of Appeals for the Fourth Circuit. James Bakker, the high-profile preacher, was sentenced for mail fraud, wire fraud, and conspiracy arising from his activities as a television evangelist. At sentencing, the trial judge stated, '[Bakker] had no thought whatever about his victims[,] and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.' The Fourth Circuit concluded that Bakker's due-process rights had been violated because the judge had impermissibly taken his own religious values into account in sentencing. It stated, 'Courts. . . cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it.'
>
> We agree with the Fourth Circuit. Although not all religious comments during sentencing are impermissible, we agree that a court cannot use religion as a factor in imposing a sentence. By factoring in religion, the court is acting outside of Ohio's sentencing guidelines, as well as violating the offender's due-process rights. . . .
>
> Here, a review of the sentencing hearing reveals that the court impermissibly factored religion into Arnett's sentence. After first considering factors favoring leniency, and then considering factors favoring a harsher sentence, the court explicitly stated that it turned to an 'additional source'–the Bible–to resolve its 'struggle' in determining an appropriate sentence. It was as if the court used the Bible as a 'tiebreaker' in its struggle of determining if Arnett's sentence should be harsh or lenient. . . . We understand that our decision may be misconstrued or interpreted as somehow hostile to religion. Not so. We stress that this case is unusual in that a specific text in the Christian Bible was the determining factor in the judge's imposition of punishment.[22]

Judge Painter interpreted *Bakker* as barring judges from taking their own religious values into account in determining a sentence. While Judge Painter said that "not all religious comments during sentencing are impermissible,"[23] he also said that "a court cannot use religion as a factor in imposing a sentence."[24] Judge Painter did not exclude all religious comments, but rather restricted the role of religious comments to admonitions about moral conduct or warnings about the legal consequences of future conduct.[25] When it came to the legal consequences of a defendant's actions before the court, Judge Painter viewed an explicit and determinative reference to a religious text by the sentencing judge as

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[22] *Arnett*, 1999 Ohio App. LEXIS 295, at *5-9 (footnotes omitted).

[23] *Id.* at *6.

[24] *Id.*

[25] *See id.* at *7, n.9.

impermissible.[26] Therefore, Judge Painter ruled that Judge Marsh violated Mr. Arnett's due process rights.[27]

C. *Petition for Disqualification*

Upon remand for re-sentencing, counsel for the defendant filed a petition for disqualification with the Ohio Supreme Court, arguing that Judge Marsh should be disqualified because of her personal religious bias and prejudice concerning the defendant.[28] Judge Marsh denied any animosity toward Mr. Arnett and expressed her commitment to follow the sentencing guidelines in re-sentencing him.[29] She also argued that her personal and community experience were legitimate influences on her decision making that did not amount to bias or prejudice:

> What I have been accused of is having a religious conviction. Every judge brings his or her entire experience, which includes religious experience, to the bench when elected. There is no requirement that judges leave the religious part of themselves at the courthouse door before entering.
>
> . . . In sentencing Mr. Arnett for ten counts of raping a child, I quoted the Bible. The language quoted from the Bible merely reflects the conscience of the community in protecting its most vulnerable citizens–children. The fact that I phrased the community conscience in religious terms does not indicate any bias personally against Mr. Arnett. . . .
>
> The sentencing of Mr. Arnett was not the first case in which I have quoted the Bible during a sentencing. It is only the first time that this has been questioned. I cannot imagine functioning on the bench without the strength and wisdom which my educational and religious experience have given me, my personal set of values developed from an ongoing combination of legal education and attendance at church . . . and many other community functions. I am a member of this community, and believe that I share in its collective conscience. . . .
>
> If to serve as Judges, we cannot have religious convictions, read the Bible, or be guided by religious principles, then we are no longer reflecting the conscience of the community which elected us.
>
> I cannot segregate myself from my past. I cannot believe that my religious past would in any way preclude me from re-sentencing Mr. Arnett in a fair manner. It may be that my years in parochial schools and the

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[26] *See id.* at *7-8.

[27] *See id.* at *6-7.

[28] *See* aff. filed by defense counsel, Charles H. Bartlett, *In re* Marsh, 723 N.E.2d 1097 (Ohio 1999) (99-AP-012) (questioning Judge Marsh's impartiality under Canon 3(E)(1) of the Code of Judicial Conduct) (on file with the *University of Dayton Law Review*).

[29] *See* letter from Melba D. Marsh, Judge, to Chief Justice Moyer 2 (Feb. 22, 1999) (on file with the *University of Dayton Law Review*).

> religious admonition to do justly and love mercy was the reason that Mr. Arnett was sentenced by me to about half the maximum possible sentence. Or perhaps my own mother's love of the Bible and its teaching when she was raising my sisters and I to take our place in this world. I cannot say for sure because my religious upbringing plays a role in every decision I make.[30]

Upon review, Chief Justice Moyer refused to disqualify Judge Marsh because of the lack of evidence of bias or animosity and her commitment to follow the law in re-sentencing Mr. Arnett in accordance with the appellate court's decision.[31]

D. Ohio Supreme Court

The Ohio Supreme Court's opinion addressed the issues raised under Ohio's sentencing statute and the due process clause of the Fourteenth Amendment. The court did not address Establishment Clause arguments under the First Amendment because they were abandoned by the defendant.[32]

Justice Cook rendered the opinion on behalf of a unanimous court. She began by reviewing the requirements of the sentencing statute, including its mandate for a judge to consider, if applicable, the exacerbation of the injury suffered by the victim because of the age of the victim.[33] The court quoted remarks about the age of the victim made by Judge Marsh before referring to Matthew 18:5-6.[34] Furthermore, the court noted the references to "little child" and "one of these little ones" in these verses from the book of Matthew.[35] The court viewed the biblical quotation as a religious phrasing of a statutory purpose underlying felony sentencing–relating the age of the victim to the seriousness of the offense.[36]

The court then turned to the role of the religious quotation in the sentencing proceedings. The court did not think that Judge Marsh's religious remarks constituted a statutory factor in her deliberations, but rather viewed them as an influence on her consideration of an explicitly permitted statutory factor:

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[30] *Id.* at 2-4.

[31] *See In re* Marsh, 723 N.E.2d at 1097.

[32] This article, however, does address the Establishment Clause implications of religious references by judges in their decisions. *See infra* notes 132-53 and accompanying text.

[33] *See State v. Arnett*, 724 N.E.2d 793, 798-99 (Ohio 2000).

[34] *See id.* at 799.

[35] *See id.*

[36] *See id.*

> [W]e conclude that her reference to the Bible assisted her in determining the *weight* that she would give to a statutory factor–the age of the victim. . . . The judge did not *add* an impermissible factor to her analysis; rather, she *acknowledged an influence* upon her consideration of an explicitly permitted factor.[37]

The Ohio Supreme Court left the weighing of the sentencing factors within the realm of the sentencing judge's discretion. The court stated:

> A discretionary decision necessitates the exercise of personal judgment, and we have determined that when making such judgments, the sentencing court 'is not required to divorce itself from all personal experiences and make [its] decision in a vacuum.'. . . Much like the judge's background, education, and moral values, the judge's insight from the Bible guided the judge in weighing the statutorily permissible age factor during her deliberations and aided her in justifying, in her mind, the lawful sentence she imposed.[38]

While a judge's discretion is not absolute, the court found Judge Marsh's reliance upon the biblical passage to be permissible.[39] In doing so, the court expressed its unwillingness to impose a particular model of jurisprudential decision making upon the exercise of a judge's discretion in sentencing. The court said:

> As the state's *amicus* notes, a *per se* rule prohibiting all references to religious texts by a sentencing judge would amount to this court's imposition of a particular and restrictive model of judicial decision making. Such a model would prohibit references to religious convictions in the oral or written justifications of judicial decisions, even though such considerations may unavoidably surface during the judge's private deliberations. The sentencing scheme enacted by the General Assembly does not adopt such a restrictive model for the sentencing judge. Indeed, as this court recently noted, some statutes *require* the sentencing judge to state both the findings *and the reasons* for those findings on the record.[40]

The court preserved the liberty of judges to adopt any of the four models of judicial decision making discussed by this author in his *amicus curiae* brief and which will be thoroughly discussed in Section III below–the separatist, publicist, privatist, or wholistic models.

The Ohio Supreme Court began its consideration of the due process issues with an affirmation of a defendant's right to a fundamentally fair sentencing hearing characterized not only by a fair result but a fair process. The court noted several general things that could deny a defendant his or

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[37] *Id.* at 799-800.

[38] *Id.* (alteration in original) (citations omitted).

[39] *See id.* at 800.

[40] *Id.* (footnote omitted).

her right to due process,[41] but quickly focused on the due process implications of religious comments by sentencing judges.[42] The court spent a considerable amount of time discussing *Bakker* and its application to the *Arnett* case. The court viewed the crux of the problem in *Bakker* as the judge's use of his *personal* religious principles as *the* basis of his sentencing decision.[43] It was the personal and determinative aspects of the religious comments in *Bakker* that violated the due process rights of the defendant.

First, in the court's view, it was not the involvement of religious ideas that were problematic in *Bakker*; it was the personal offense that was impermissible. Judge Marsh, on the other hand, did not express personal offense as if she were a party to the case; rather she expressed in religious terms society's interest in severely punishing those who harm children.[44] The religious comments had a public rather than personal purpose. The court said:

> The sentencing judge's comments in *Bakker* revealed that he had been personally offended, as a religious person, by the offender's frauds. When he said 'those of us who have a religion are ridiculed as being saps from money-grubbing preachers or priests,' the sentencing judge in effect inserted himself as a party to the case–aligning himself with the plaintiffs whom the televangelist defrauded. . . . Here, on the other hand, Arnett's sentencing judge cited a religious text merely to acknowledge one of several reasons–'one additional source'–for assigning significant weight to a legitimate statutory sentencing factor.[45]

Second, the Ohio Supreme Court did not consider the involvement of religious conviction as objectionable in *Bakker*; but rather the role of religious conviction as the sole basis of the sentencing decision. In the court's view, Judge Marsh's religious comment was not the sole, essential, determining, or primary basis of her sentencing decision.[46] The record demonstrates that the biblical quote was one among many factors considered by Judge Marsh:

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[41] *Id.* at 801. Sentences have been vacated as violative of due process when they were based on false assumptions of information, parochialism, or improper considerations of race or national origin.

[42] *See id.*

[43] *See id.* at 802.

[44] *See id.* at 802-03 (citing United States v. Autullo, No. 95-1020, 1995 U.S. App. LEXIS 17129 (7th Cir. July 12, 1995) (finding religious comments by a trial court permissible because they demonstrated community outrage rather than personal animus).

[45] *Id.* at 803 (citation omitted).

[46] *See id.* at 797, 802-03.

> Though a fair reading of the record supports the court of appeals' conclusion that the judge's reference to the Book of Matthew assisted her in finally resolving her deliberative struggle, *Bakker* merely prohibits a judge's personal religious principles from being '*the basis* of a sentencing decision.' (Emphasis added.) *Bakker*, 925 F.2d at 741. Here, the record discloses many factors that cumulatively formed the basis of the court's sentence, including the testimony and letters provided to the court on behalf of Arnett and the victim, the psychologist's testimony regarding the harm suffered by the victim, and the nature of the multiple offenses. The Bible was but one factor, among many, that supported this judge's legally unremarkable decision to assign significant weight to the seriousness of Arnett's offenses against [a] young victim[ ].[47]

Thus, the court concluded that Judge Marsh's biblical reference did not violate Arnett's due process right to a fundamentally fair sentencing.[48]

III. MODELS OF THE RELATIONSHIP BETWEEN RELIGIOUS BELIEF AND DECISION MAKING

This section of the article presents the above-mentioned models of judicial decision making and draws illustrations of them from *Arnett*, *Bakker*, and other cases. The models are constructed around the role given to religious beliefs in judicial deliberations and justifications of decisions. The following chart sets forth the logical possibilities for the conscious involvement of religious convictions in judicial decision making.[49]

Role of Religious Beliefs	Deliberation	Justification
Separatist	No	No
Publicist	No	Yes
Privatist	Yes	No
Wholist	Yes	Yes

The presentation of these models raises a number of issues. What is a religious belief? What is meant by deliberation and justification and what is the relationship between them? What factors impact the influence of

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[47] *Id.* at 804. Apparently, the court did not use the word "factor" in the sense used in the sentencing statute when discussing due process considerations. Perhaps the statutory "factors" refer to characteristics of the defendant, crime and victim. This use of the word "factor" probably should be read as a reason, influence or consideration bearing upon the weighing of a statutory factor.

[48] *See id.*

[49] The models are similar to those utilized by Mark Modak-Truran (although his understanding of the Establishment Clause differs from that employed herein). *See* Modak-Truran, *supra* note 3, at 255. The models also bear a resemblance to the topology utilized in Reinhold Niebuhr's book *Christ and Culture*. *See also* Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 192-95 (1992).

religious beliefs on these processes? How do these models relate to one another? Therefore, a few words of explanation are necessary.

First, religious belief can be defined narrowly, focusing on particular beliefs such as a belief in a Supreme Being, adherence to an ethical code, or worship; or religious belief can be defined broadly, focusing on the status of the belief such as "ultimate concern"[50] or "non-dependence."[51] The definition utilized can impact a court's view of the permissibility of religious consideration or comment. For instance, a narrow definition may exclude a traditional theistic reference, but admit a materialistic reference from judicial reasoning. On the other hand, a broad definition may give theistic and materialistic convictions equal opportunity to influence judicial decision making. While this article presupposes the superiority of the broad over the narrow definition of religious belief, it accounts for both approaches.

Second, the models are organized around two parts of the judicial decision making process: deliberation and justification. Deliberation refers to the thought processes leading to judicial decisions, while justification refers to the oral or written expressions of the rationale for a judge's decision. These definitions are meant to be somewhat ambiguous. They do not attempt to adjudicate the debate between formalists and realists over the purpose of judicial decisions.[52] Formalists tend toward a view of justification as a formal explanation of deliberation. Realists tend to view

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[50] PAUL TILLICH, SYSTEMATIC THEOLOGY 11-12 (1967) (stating "[t]he 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").

[51] ROY A. CLOUSER, THE MYTH OF RELIGIOUS NEUTRALITY 21-22 (1991) (stating "[a] religious belief is any belief in something or other as divine. 'Divine' means having the status of not depending on anything else"). What makes a belief "religious" is its non-dependent status. It is not worship that makes a belief religious. Although many religions engage in such practices, not all religions do so. For instance, there are forms of Buddhism in which there is no worship. It is not belief in a Supreme Being that makes a belief religious. Although many religions honor a deity, not all religions do so. For instance, the Brahman-Atman in Hinduism is not considered a being but being-itself. It is not an ethical code that makes a belief religious. Although many religions view certain conduct as virtuous, not all religions do so. For instance, Shinto believers have no obligation to adhere to an ethical code. Rather, the thing shared by what are commonly thought of as religious beliefs is the non-dependent status of a belief. This is expansive religion. Viewed in this way, religion permeates every aspect of our experience, not just the private, personal, and family areas of life, but the classroom, marketplace, and courtroom. It includes not only theistic beliefs, but materialistic beliefs about the non-dependent reality upon which all else depends. On this view, all jurists are believers. They may be devoted fanatics or uncertain seekers but their faith commitments play a role in their legal functioning. *See generally* Mark B. Greenlee, *Maps of Legality: An Essay on the Hidden Role of Religious Beliefs in the Law of Contracts*, 4 REGENT U. L. REV. 39, 51-58 (1994) (summarizing Clouser's theory of religious belief and its relationship to theory).

[52] Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 541-42 (1998).

justification as rationalization of a decision reached during deliberation in terms of traditional judicial sources of authority. Although some of the models may be more conducive to one or the other approach, the models allow latitude for both approaches.

Third, the influence of religious beliefs on judicial decisions varies depending on factors such as importance, awareness, and skill. Some religious beliefs may be of central importance to a judge, exerting a controlling influence over her decision making, while others may be of less importance, taking on a minor role in her decision making.[53] Furthermore, a particularly gifted judge may be able to discern the influence of specific religious beliefs upon her decision making, but, more often than not, the influence of religious beliefs operates below the consciousness of judges. It is difficult for a judge to know whether a particular position is influenced by a religious belief or not because of the imperceptible influence of family upbringing, religious training, and formal education upon it. Even if a judge attempts to separate religious beliefs from other beliefs, she may not be able to do so in all cases. Even if a judge desires to utilize particular religious beliefs in her decisions, she may lack experience with consciously applying them.

Finally, these models are not mutually exclusive. A judge might adopt a combination of them. For example, a wholist judge might have strong publicist tendencies if she views herself primarily as a representative of the conscience of the community. Some of these nuances and variations on the models will be discussed below. Even with the limitations of this classification scheme, it significantly clarifies the approaches to the role of religious beliefs in judicial decision making.

A. Separatist

The separatist model maintains that religious convictions should not be relied upon during either deliberation or justification. In other words, religious convictions and legal analysis belong to separate realms and should not be mixed. It presupposes that there are, in fact, two categories of belief–religious and secular–and that these categories are mutually exclusive and discernable. The reasons espoused for this position might be jurisprudential. For example, a legal positivist might believe that a judge should only rely upon properly promulgated positive law such as statutes and regulations. From this vantage point, adjudication amounts to the

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[53] *See generally* Louis E. Newman, *Beneath the Robe: The Role of Personal Values in Judicial Ethics*, 12 J.L. & REL. 507 (1995).

discovery and application of rules contained in applicable legal materials to the facts in particular cases to determine the appropriate judicial result. A judge's religious and moral beliefs are viewed as irrelevant to this task. Therefore, judges should decide cases without reference to them.[54]

The rationale for a separatist position might also be derived from traditional religious belief. For example, a judge's religious faith might emphasize liberty of conscience, calling her to refrain from imposing her religious beliefs on others. But, even more than this, a judge holding to such a non-imposition principle might believe it is improper to use her position to coerce behavior consistent with her religious convictions. A judge adhering to this view would only take a position consistent with her religious convictions when she is convinced that there is an independent, secular basis for the position.[55] Whatever the rationale, jurisprudential or theological, separatists aspire to exclude moral and religious considerations from the adjudication process to the fullest extent possible.

A separatist view of the relationship between law and religion could underlie the *Bakker* decision. For example, the *Bakker* court said, "[w]hether or not the trial judge has a religion is irrelevant for the purposes of sentencing."[56] In addition, the *Bakker* court remanded the case for re-sentencing "[b]ecause an impermissible consideration was interjected into the sentencing process."[57] The "irrelevant" and "interjected" remarks could reflect an underlying separatist view of the relationship between religious conviction and legal analysis–they should not be mixed.

This view of *Bakker* was taken by the Nebraska Supreme Court in *State v. Pattno*.[58] In reviewing the propriety of a judge's reference to Romans 1:20–32 while sentencing a defendant who had sexually assaulted a child,

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[54] Justice Frankfurter of the United States Supreme Court is often quoted for his espousal of this view. The following quotation clearly expresses a separation between Frankfurter the judge and Frankfurter the person:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and actions of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.

West Virginia v. Barnette, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting). *See also* ROBERT A. BURT, TWO JEWISH JUSTICES 44-45 (1988).

[55] *See* Calhoun, *supra* note 4, at 302 (stating "[o]nly if secular reasons, standing alone, justify his support can the Christian do so without imposing his faith").

[56] United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991).

[57] *Id.* at 741.

[58] 579 N.W.2d 503 (Neb. 1998), *cert. denied*, 525 U.S. 1068 (1999).

the court objected to the "explicit intrusion of personal religious principles as the basis of a sentencing decision"[59] and remanded the case for re-sentencing by a different judge because the trial judge had "interjected his own religious views immediately prior to sentencing."[60] Furthermore, the court expressed its concern with the issue of separation of church and state: "Allowing a court to recite scripture, and thereby proclaim its interpretation of that scripture, implies that the court is advancing its own religious views from the bench."[61] These remarks point to an underlying separatist view of the relationship between religious belief and the law.

A separatist view of the role of religious belief in judicial decision making also appears to lie beneath the majority opinion of the appellate court in *Arnett*. Judge Painter begins his analysis with limitations on a judge's discretion: "We are constrained to follow the law. . . . Under the Revised Code, the religious beliefs of the trial judge are not a statutory factor that may be considered."[62] These words are consistent with a positivist perspective that aims for strict separation of law and religion. Thus, Judge Painter concludes, "[a] court cannot use religion as a factor in imposing a sentence. By factoring in religion, the court is acting outside of Ohio's sentencing guidelines, as well as violating the offender's due-process rights."[63]

Judge Painter's separatist views become even clearer as he tries to avoid the impression that his decision was "hostile to religion"[64] by saying that "not all religious comments during sentencing are impermissible."[65] This statement was accompanied by a footnote quoting language from *Bakker* that "a judge can lecture a defendant as a lesson to that defendant and as a deterrent to others."[66] It appears that Judge Painter would allow explicitly religious comments so long as they do not relate to the sentence itself–a judge may use religious language to encourage an offender to "go, and sin

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[59] *Id.* at 508.

[60] *Id.* at 509.

[61] *Id.* It is possible these considerations would not have been enough for the Supreme Court to reach its conclusion. The court also noted that the trial judge referred to the nature of the defendant. *Id.* The sexual crime the defendant was charged with involved sexual contact with a minor, while the biblical passage deals with sexual contact between males. Thus, the biblical passage was actually irrelevant to the crime. Therefore, the trial judge's reference to it may have embodied personal animus toward the defendant. *Id.*

[62] State v. Arnett, Nos. C-980172 & C-980173, 1999 Ohio App. LEXIS 295, at *1 (Ohio Ct. App. Feb. 5, 1999).

[63] *Id.* at *2.

[64] *Id.* at *3.

[65] *Id.* at *2.

[66] *Id.* at *2 n.9.

no more"[67] or warn others of a temporal "day of judgment,"[68] but a judge may not use religious language to articulate a reason for her sentencing decision. This is consistent with a positivist perspective that aims for strict separation of law and morality, law and religion.

B. Publicist

The publicist model holds that religious convictions should not be relied upon during deliberation but should be relied upon during justification. This model might be applied by a judge in a society ruled exclusively by religious law, as in the case of Afghanistan's Taliban. A similar attitude might even exert an influence over a judge in a religiously homogenous community in the United States. In either case, judges adopting this model would justify their decisions by reference to religious convictions upon which they did not really rely in reaching their decision because they conform to religious and political orthodoxy. Whether it is the approval of the theocratic state or the electorate that is sought, the motivation for this approach is expediency–choosing religious means of justification to retain a judicial position or make a judicial result palatable.

This model could be evidenced by reliance upon the conscience of the community as the basis of decision. While Judge Marsh viewed herself as a representative of the community that elected her, the account of her personal struggle to determine an appropriate sentence for Mr. Arnett precludes viewing her decision as an exercise of the publicist model.[69] This construction would be inconsistent with her honest pursuit of wholeness. It is certainly possible, however, for a judge to operate from a publicist perspective. That said, it seems an unlikely model to be openly advocated in the United States. Therefore, it is mostly of theoretical interest.

C. Privatist

The privatist model flips the realm of permissible reliance from justification to deliberation. It allows for reliance upon religious convictions during deliberations about, but not during justifications of,

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[67] "And Jesus said unto her, Neither do I condemn thee: go, and sin no more." *John* 8:11 (New King James).

[68] "The Lord knows how to deliver the godly out of temptations and to reserve the unjust under punishment for the day of judgment." 2 *Peter* 2:9 (New King James).

[69] *See* letter from Melba D. Marsh to Chief Justice Moyer, *supra* note 29, at 2-3.

judicial decisions. Some proponents of this position view reliance on religious convictions as a special case–such reliance is appropriate only as a last resort during deliberations where applicable legal materials are indeterminate; that is, in so-called hard cases. They go on, however, to argue that judges should not include references to religious convictions in their opinions. Kent Greenawalt, for example, has argued that judges may sometimes rely on religious convictions in deliberations but they should be very hesitant to do so.[70] Greenawalt argues, however, that judges should always base their oral or written explanations on reasons shared by all.[71] Greenawalt supports his view with observations of the practice of opinion writing where he sees judges ordinarily drawing upon common assumptions and forms of reasoning rather than diverse convictions, and considerations of fairness in a culture filled with people with variant religious views.[72]

Stephen Carter has argued for a more expansive role for religious convictions in the deliberative process.[73] He would allow religious beliefs the same role as moral beliefs.[74] Carter argues that moral beliefs enter judicial decision making in a number of ways.[75] For example, judges in immigration law cases decide whether an applicant is of "good moral character," and judges set aside contracts on the ground that they "shock the conscience of the court."[76] Agreeing with Greenawalt, Carter would exclude religious convictions from the justification process in written opinions where he would require judges to articulate decisions in a professionally responsible way in terms of the norms of judging.[77] Carter believes that this approach to justification is necessary to constrain the decision making of judges, reining in their personal values.[78]

An even stronger claim for the role of religious convictions in the deliberation process is made by Mark Modak-Truran who argues that judicial deliberation in hard cases necessarily relies on religious convictions but that the Establishment Clause requires that these religious convictions must remain implicit in judicial opinions.[79] He views the

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[70] *See* GREENAWALT, *supra* note 3.

[71] *See id.* at 142-43, 149.

[72] *See id.* at 4, 142.

[73] *See* Carter, *supra* note 3.

[74] *See id.* at 933, 943.

[75] *See id.* at 935.

[76] *See id.*

[77] *See id.* at 943.

[78] *See id.*

[79] *See* Modak-Truran, *supra* note 3, at 257 (stating "judicial deliberation necessarily relies on a comprehensive or religious conviction about authentic human existence in hard cases but that the

Establishment Clause as barring a judge from explicitly stating a religious reason for her decision.

Statements by the appellate court in *Bakker* and *Arnett* could be read in a privatist way. The *Bakker* court objected to "the explicit intrusion of personal religious principles as the basis of a sentencing decision."[80] It also refused to approve of judges that "announce their personal sense of religiosity."[81] In the *Arnett* appellate court opinion, Judge Painter was concerned with Judge Marsh's "religious comments" and the fact that she "explicitly stated" that she turned to the Bible.[82] This approach boils down to this: "If you must think about religion on the bench, keep it to yourself."

Of course, it would be impossible for an appellate court to object if a judge acted consistently with this approach because the judge would not comment upon such reliance on the record. The only way to exclude such reliance would be through the qualification process. The exclusion of federal judges with self-conscious religious identities, however, would be suspect under the Religious Test Clause of the Constitution.[83] In any event, judges could not be prohibited from relying upon religious beliefs in their deliberations if they were silent about it.

D. Wholist

The wholist view maintains that religious convictions must or may be relied upon in deliberation and justification. Wholist individuals holding to a broad definition of religious belief, such as "ultimate concern" or "non-dependent reality,"[84] find reliance upon religious convictions *unavoidable*. In this view, reliance on religious convictions during deliberations is inevitable in easy, as well as hard cases. Judges who accept this position would likely believe that they are called to live out their faith on the bench. Judge Raul A. Gonzalez, for example, writes about his spiritual journey and the influence his faith has had on some of his decisions as a member of the Texas Supreme Court:

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establishment clause of the First Amendment requires that these comprehensive claims remain implicit in judicial opinions").

[80] United States v. Bakker, 925 F.2d 728, 741 (4th Cir. 1991).

[81] *Id.* at 740.

[82] *See* State v. Arnett, Nos. C-980172 & C-980173, 1999 Ohio App. LEXIS 295, at *3, 6 (Ohio Ct. App. Feb. 5, 1999).

[83] *See* U.S. CONST. art. VI, cl. 3.

[84] CLOUSER, *supra* note 51, at 18.

> There are some who believe that religious beliefs should be private and have no bearing on their work. There are others, like myself, who believe that we are called to live our faith full time, not just on weekends, and that all our thoughts, words, and deeds should be impacted by our religious convictions. To me, it is an inescapable fact that our perspective on any issue is influenced by where we place ourselves on the religious spectrum. To deny this fact is to be dishonest.[85]

This broad approach to the definition of religion blurs the distinction between private and professional beliefs, religious and secular activities, giving any ultimate concern or non-dependent belief the status of a religious belief and the potential for impact on many areas of life. From this perspective, some religious beliefs will influence the outcome of judicial thinking whether they are recognized as religious or not.

Wholist individuals adopting a narrower definition of religious belief, focusing, for instance, on belief in a Supreme Being, an ethical code, or authoritative text, find reliance upon religious beliefs to be avoidable, although they may view such reliance as *permissible* in deliberations about, and justifications for decisions, particularly in hard cases.[86] They also tend to encourage disclosure of the real reasons underlying decisions, whether they are religious or not, as a matter of personal integrity and/or as a principle of democratic discourse. To ask for less than full disclosure from those who judge seems inconsistent with the spirit of the principle of open courts.

Beyond the question of the *unavoidable* or *permissive* involvement of religious beliefs in judicial decision making, wholistic judges may take an *additive*, *directive* or *consumptive* approach to the role of their faith in their judicial office. A judge might believe that it is impermissible to rely on religious conviction to justify a decision unless the decision is supported by an *additional* secular reason. For example, Michael J. Perry has argued that where relevant legal materials are underdeterminate,[87] a judge may rely on a religious premise if a plausible secular premise also supports the judge's resolution of the case. In such a case, Perry argues that the judge should not conceal her reliance on religious premises.[88] Perry believes that the parties to a case should be informed of all the significant reasons for the outcome of the case. He does so based on the rule of law, which governs the process of adjudication:

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[85] Gonzalez, *supra* note 5, at 1147.

[86] *See* Idleman, *supra* note 2, at 442, 455.

[87] *See* Perry, *supra* note 6, at 102. Perry explains his usage of the term as follows: "Because the relevant legal materials typically rule out many possible resolutions of a case even if they do not rule in just one resolution, underdeterminate is a more accurate term than indeterminate." *Id.*

[88] *See id.* at 104.

> [T]he rule of law requires, on any plausible account, 'that judicial decisions should be in accordance with law, issued after a fair and public hearing by an independent and impartial court, and that they should be reasoned and available to the public.' In what sense, and to what extent, is a judicial decision 'reasoned and available to the public' if in its opinion a court conceals one of the premises on which it has consciously relied?[89]

Michael Perry most likely would permit Judge Marsh's religious comment because of her "struggle" with determining the appropriate sentence. Using Perry's word, the statutory language was "underdeterminate."[90] The statute allowed Judge Marsh the discretion to weigh the statutory factors. She did so with the aid of a religious text, but the sentence was also supported by a secular reason–the age of the victim.[91] Judge Marsh viewed the biblical passage as calling for serious punishment for those who harm a child.[92] The statute allowed for harsher punishment of offenders who commit crimes against children.[93] Given the secular support, Perry would probably view the reference to the book of Matthew as permissible.

Alternatively, a judge could see her religious convictions as *directing* her approach to the law and facts of a case. For example, Judge Wendell L. Griffen argues that judges have the right to include religious convictions when reaching and justifying decisions.[94] He sees judicial decision making as a value-laden process that should be open to various sources of knowledge.[95] He says:

> [J]udges 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 Douglas, and Martin Luther King, Jr., without embarrassment or hesitation as we deliberate.
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> We also have the right to include religious sources when we justify the decisions we reach. . . . 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 all agree about these

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[89] *Id.*

[90] *Id.* at 102.

[91] *See* tr. at 45-7, 49, 53.

[92] *See id.* at 51-53.

[93] *See* OHIO REV. CODE ANN. § 2929.12(B)(1) (Anderson 1999).

[94] *See* Griffen, *supra* note 5, at 518.

[95] *See id.* at 515-16.

> 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 judges hear (or should hear) the same voices, but that all the voices have a right to be heard and articulated in the process that judges use to reach and justify our decisions.[96]

Judge Marsh heard the voices of the defendant's sister, the victim's mother, the psychologist, and the electorate, but the Bible guided, informed, or shaped her decision.[97]

Justice Cook's opinion in *Arnett* contained wholistic elements; at least it left room for a wholist approach to sentencing. She wrote:

> The judge did not add an impermissible factor to her analysis; rather, she acknowledged an influence upon her consideration of an explicitly permitted factor. Much like the judge's background, education, and moral values, the judge's insight from the Bible guided the judge in weighing the statutorily permissible age factor during her deliberations and aided her in justifying, in her mind, the lawful sentence she imposed. . . . As the state's *amicus* notes, a *per se* rule prohibiting all references to religious texts by a sentencing judge would amount to this court's imposition of a particular and restrictive model of judicial decisionmaking [sic]. Such a model would prohibit references to religious convictions in the oral or written justifications of judicial decisions, even though such considerations may unavoidably surface during the judge's private deliberations. The sentencing scheme enacted by the General Assembly does not adopt such a restrictive model for the sentencing judge.[98]

Justice Cook was sympathetic to the wholist model, recognizing that "the judge's insight from the Bible guided the judge"[99] and that "religious convictions. . .may unavoidably surface during the judge's private deliberations."[100] Therefore, the court was unwilling to mandate the adoption of the separatist or privatist model of the relationship between religious convictions and sentencing, leaving judges free to select their own jurisprudential starting points.[101] In other words, the court refused to require a sentencing judge to leave certain religious beliefs on the courthouse steps. Notice, however, that the opinion did not impose a wholistic view of judicial decision making on all judges. It merely left room for this approach to judging, recognizing it as a legitimate option as a judge exercises her discretion on the bench.

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[96] *Id.* at 518-19.

[97] *See* tr. 24-40, 43-46; letter from Melba D. Marsh to Chief Justice Moyer, *supra* note 29, at 3-4.

[98] State v. Arnett, 724 N.E.2d 793, 800 (Ohio 2000) (emphasis in original) (footnote omitted).

[99] *Id.*

[100] *Id.*

[101] *See id.*

The wholist approach might also take a *consumptive* form–the wholistic impulse could totally consume the distinction between personal and official decision making. For instance, Judge Marsh's reference to the Bible could be viewed as mandating a severe penalty without regard to the statutory factors–because the Bible dictates a harsh punishment for the offense, a harsh punishment must be imposed. However, this interpretation makes too much of Judge Marsh's remarks. The proceedings evidence a review of the statutory factors by Judge Marsh followed by an indication that she turned to *one additional source* in the final part of her struggle to determine Mr. Arnett's sentence.[102] Her remarks indicate that her reference to the Bible was "part"[103] of her deliberations, rather than the exclusive basis of her decision. In addition, the fact that the sentence imposed by Judge Marsh was approximately half of the maximum sentence clashes with this interpretation.[104] In any event, the Ohio Supreme Court's opinion in *Arnett* would not permit a judge to rely upon her religious faith rather than the law as the basis of a sentencing decision.[105] The court limited the influence of religious belief to the bounds of the sentencing statute. It must be a lawful sentence taking account of the statutorily mandated factors.[106]

It is also important to note that the Ohio Supreme Court's decision leaves open the possibility of reference to many religious texts and convictions. Other biblical texts might have been quoted by a judge in this situation. Judge Marsh herself alluded to biblical texts dealing with love and mercy as a possible reason for her imposition of a sentence of approximately one half the maximum.[107] Another judge might have justified a light sentence with another quotation such as "vengeance is mine saith the Lord."[108] Furthermore, there are many sacred texts that speak to the legal aspect of life. Christians are not alone in applying their faith in the legal context. Persons of Jewish, Islamic, Hindu and other faiths bring perspectives to the law.[109] Judges may find these sources

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[102] *See* tr. at 52.

[103] *Id.*

[104] *See* State v. Arnett, 724 N.E.2d 793, 804 (Ohio 2000). *See also* State v. Arnett, Nos. C-980172 & C-980173, 1999 Ohio App. LEXIS 295, at *3 (Ohio Ct. App. Feb. 5, 1999) (Hildebrandt, J., dissenting).

[105] *See Arnett*, 724 N.E.2d at 800.

[106] *See id.* at 799-800.

[107] *See* letter from Melba D. Marsh to Chief Justice Moyer, *supra* note 29, at 4.

[108] *Romans* 12:19 (King James).

[109] *See, e.g.*, Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993); Ludo Rocher, *Hindu Conceptions of Law*, 29 HASTINGS LAW J. 1283 (1978); Ved P. Nanda, *Hinduism and My Legal Career*, 27 TEX. TECH L. REV. 1229 (1996); K.L. Seshagiri Rao, *Practitioners of Hindu Law: Ancient and Modern*, 66 FORDHAM L. REV. 1185 (1998); Kinji Kanazawa, *Being a Buddhist and a Lawyer*, 66 FORDHAM L. REV. 1171

helpful as they struggle with their decisions. The Ohio Supreme Court would permit these references also as long as they were within the lawful bounds of the sentencing statute.

IV. CONSEQUENCES OF A *PER SE* RULE BARRING RELIGIOUS REFERENCES

The Ohio Supreme Court stated that the adoption of a *per se* rule barring references to religious texts would result in the imposition of a restrictive model of judicial decision making not mandated by Ohio's sentencing statute.[110] The adoption of a rule prohibiting references to religious texts as a basis for a decision would amount to the imposition of something along the lines of the separatist or privatist models of judicial decision making. This would lead to a number of other undesirable consequences, including, but not limited to, the following.

First, it would threaten the personal and professional integrity of religiously wholistic judges by forcing them to hide the real reasons for their decisions if they consciously rely upon religious convictions during their deliberations. For a judge, integrity calls for opinions consistent with her discernment of the best resolution for the dispute at hand. A rule prohibiting references to religious texts as a basis for a decision would permit a judge adhering to the separatist or privatist models to act with integrity, while barring a wholistic judge from doing the same.[111]

Second, it would further the trend toward the trivialization of religious belief. The enforced separation of religious belief, at least theistic varieties such as Judaism, Christianity, and Islam, from judicial decision making, tells judges of these faiths that their faith really does not matter outside the realm of their personal lives. Religious belief is treated as something private, something trivial, like a hobby.[112] In addition, this forced dichotomy is a demand that may well be impossible to satisfy, since the family upbringing, formal education, and life experience of a judge may be inextricably bound up in a religious view of life.

Third, it also would be counter to expectations of those who elect judges based in part upon their values, commitments, and religious identity.

(1998); Azizah Y. al-Hibri, *On Being a Muslim Corporate Lawyer*, 27 TEX. TECH L. REV. 947 (1996); and Azizah Y. al-Hibri, *Faith and the Attorney-Client Relationship: A Muslim Perspective*, 66 FORDHAM L. REV. 1131 (1998).

[110] *See* State v. Arnett, 724 N.E.2d 793, 799-800 (Ohio 2000).

[111] *See* Daniel O. Conkle, *Religiously Devout Judges: Issues of Personal Integrity and Public Benefit*, 81 MARQ. L. REV. 523 (1998).

[112] *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 22, 29 (1993).

Permitting persons campaigning for election as judges to make such references, but barring sitting judges from relying upon their religious convictions as they decide cases amounts to institutionalized hypocrisy.[113]

Fourth, it would deprive the litigants and the public access to significant influences on a decision. It would distort the decision making process and conceal the underpinnings of opinions, cutting off open dialogue about law, religion, and society. It seems strange for a country guaranteeing citizens their day in open court to require judges to conceal the full rationale for their decision. It runs counter to our democratic impulses to consider, debate, and challenge the views of fellow citizens. A better way to ensure that religious beliefs are properly employed would be to permit them to enter the process of judicial deliberation *and justification*.[114]

Fifth, it would deprive judicial discourse of the wisdom of the deepest convictions of many of our judges concerning the meaning of justice. Deeply held religious beliefs have exercised an important influence on the shape of many reform movements such as the abolitionist and civil rights movements.[115] The task of judging also should continue to be open to wisdom rooted in religious beliefs. Many sentencing statutes do not provide a mathematical formula for determining a sentence. Instead, they call for the exercise of human judgment about aggravating and mitigating circumstances. This evaluation naturally involves moral and religious beliefs. Judges with sentencing discretion should be permitted to draw upon these personal values as they face their difficult task.

Sixth, it would ignore the empirical evidence of judicial usage of religious texts. Judges already allow religious convictions to direct their decision making. Numerous examples can be cited from around the country in which judges refer to religious values in their reasoning.[116] For example, a New York appellate court permitted the following reference to the Talmud during the trial court's sentencing of a murderer:

> I direct your attention, counselor, to the words of the Talmud, where it says that when a man comes into this world, he comes into this world with his fist clenched, yelling and wanting everything, and when he leaves this world he

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[113] *See* Griffen, *supra* note 5, at 516.

[114] *See* David S. Caudill, *Pluralism and the Quality of Religious Discourse in Law and Politics*, 6 U. FLA. J.L. & PUB. POL'Y 135 (1994).

[115] MARK A. NOLL, ed., RELIGION AND AMERICAN POLITICS FROM THE COLONIAL PERIOD TO THE 1980S 142 n. 31, 158 (1990) and JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 244-50 (1985); *but see* ROBERT M. COVER, JUSTICE ACCUSED (1975).

[116] *See, e.g.*, the cases collected in J. Michael Medina, *The Bible Annotated:Use of the Bible in Reported American Decisions*, 12 N. ILL. L. REV. 187 (1991). *See also* Idleman, *supra* note 2, at 473-78; J. Nelson Happy & Samuel P. Menefee, *Genesis!: Scriptural Citation and the Lawyer's Bible Project*, 9 REGENT U.L. REV. 89 (1997); Greenlee, *supra* note *.

> leaves it with his hands open, quietly, needing nothing. This defendant has evinced the juvenile predatory syndrome that seems to be so rampant in our society today.[117]

Even the biblical passage at issue in *Arnett*[118] has been quoted by an appellate court in the context of a child abuse case:

> The offense here inspires greater horror than the sentence received and obliges the full rigor of the penal law within the ambit of the negotiated plea bargain. Child abuse, in this case a particularly vicious sexual attack on a ten-year-old girl, should not be countenanced or condoned in any fashion. The condemnation of crimes against the young is deeply ingrained in the ethical and moral history of western civilization. Indeed, the bible is replete with references to this universal condemnation as, for example, the following scriptural passage concerning children–'Whosoever shall offend one of these little ones. . . it were better that a millstone were hanged about his neck, and that he were drowned in the depth of the sea.'[119]

Ohio judges have also engaged in the practice of referring to the Bible. For example, judges have cited the Bible in cases involving land use, defamation, search and seizure, fair sentencing hearing, death sentence, divorce, constitutional interpretation, double jeopardy, and child visitation.[120]

Seventh, it would decrease the expression of religious diversity by judges. For a wholistically-minded judge, hiding her religious convictions may not be an option in a hard case. If she cannot rely upon and/or explicitly explain the reasons for her decision, she may need to recuse

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[117] Ruth Hochberger, *Appeal of Sentence Protests Judge's Quote from Talmud*, N.Y.L.J., Jan. 7, 1980, at 1, col. 4. The appellate court refused to find that the trial court's use of an aphorism ascribed to a religious work violated the Establishment Clause or tainted the sentencing proceeding with religious bias. People v. Carter, 424 N.Y.S.2d 15 (N.Y. App. Div. 1980).

[118] *See supra* note 16 and accompanying text.

[119] People v. Jagnjic, 447 N.Y.S.2d 439, 443 (N.Y. App. Div. 1982) (Lupiano, J. dissenting) (citation omitted).

[120] *See* State v. Bedford, 529 N.E.2d 913, 925 (Ohio 1988) (Wright, J., dissenting) (quoting Proverbs 17:9); Eastland Woods v. Tallmadge, 443 N.E.2d 972, 978 n.9 (Ohio 1983) (Brown, J., dissenting) (quoting Matthew 22:34-39 and Leviticus 19:18); Brown v. Cleveland, 420 N.E.2d 103, 109 n.6 (Ohio 1981) (Brown, J., dissenting) (quoting 2 Corinthians 3:6); Wolfe v. Wolfe, 350 N.E.2d 413, 416-17 (Ohio 1976) (citing Genesis 2:24, 28; Deuteronomy 24:1; Exodus 21:7-11; Deuteronomy 22:13-19, 28,-29; Matthew 5:31-32, 19:4-6, 18; Mark 10:2-12; Luke 16:18; Romans 7:2; 1 Corinthians 7:10-11; and Ephesians 5:31-33); State v. Lynch, 102 N.E. 670, 683 (Ohio 1913) (Wanamaker, J., dissenting) (citing 2 Corinthians 3:6); State v. Badley, No. 68349, 1995 Ohio App. LEXIS 4988, at *21 n.1 (Ohio Ct. App. Nov. 9, 1995) (Patton, J., dissenting) (quoting Proverbs 28:1); State v. Dunbar, No. 88 C.A. 132, 1988 Ohio App. LEXIS 2549 (Ohio Ct. App. Jun. 27, 1989) (Cox, J., concurring) (paraphrasing Matthew 27:21); Johnson v. Johnson, Nos. C-830635 & A-8006429, 1989 Ohio App. LEXIS 2549, at *2 (Ohio Ct. App. July 11, 1984) (citing 1 Kings 3:16-28); State v. Fletcher, 259 N.E.2d 146, 154 n.23 (Ohio Ct. App. 1970) (quoting I Nahum 9); Muccii v. Dayton Newspaper, Inc., 654 N.E.2d 1068, 1074 (Ct. Com. Pleas 1995) (citing Proverbs 22:11).

herself. If this recurs frequently, she may need to resign. Therefore, an exclusionary rule would tend to force persons with traditional theistic convictions out of the decision making process in hard cases, where their convictions probably matter the most, if not out of the judiciary completely.

Finally, prohibiting reliance upon religious texts would create difficulties distinguishing the appropriate use of religious sources of knowledge from moral, literary, historical, sociological, economic, and philosophic sources of knowledge.[121] It could lead to the absurd result of allowing judges to draw upon fairy tales and comic strips, but not the Bible, in their decision making.[122] If judges may rely upon these sources in considering and justifying their decisions, what good reason could there be for excluding religious sources of knowledge? Furthermore, a rule excluding reliance upon religious sources would create difficulties determining when a religious source has been relied upon. Would references to "my brother's keeper" in tort cases; "serve two masters" in fiduciary duty cases; "blood cries out" in murder cases; "the letter kills, but the spirit gives life" as a principle of interpretation; "split the baby" in contract cases; "turn the other cheek" in equity cases; or "eye for an eye" in assault cases be out of bounds with or without citations to the Bible?[123] Tracing a remark to a biblical source should not constitute reversible error. Rather, it should be permissible to make such references where they have a judicial function.

V. CONSEQUENCES OF THE UNLIKELY ADOPTION OF THE PUBLICIST MODEL

A few of the consequences that would flow from a rule barring religious references as the basis for decision would also flow from a rule requiring references to religious texts as a basis for decision–the adoption of

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[121] *See* Griffen, *supra* note 5, at 518.

[122] *See* Colleen D. Ball, *Hard-Boiled Judges Like Poaching Nursery Egg*, NAT'L. L.J., June 8, 1998, at A25 (listing 375 state and federal court citations to Humpty Dumpty); Colleen D. Ball, *Live Happily Ever After, Ruled by Law*, USA TODAY, Jan. 5, 1999, at 17A (providing judicial opinion references to children's literature such as the Three Little Pigs, The Princess and the Pea, Alice in Wonderland, Horton Hatches the Egg, The Emperor's New Clothes, etc.); Colleen D. Ball, *Lawyer's Brush with Fame*, NAT'L. L.J., Dec. 27, 1999, at A20 (supplying judicial citations to fairy tales and children's literature).

[123] *See Genesis* 4:9, *Matthew* 6:24, *Genesis* 4:10, 2 *Corinthians* 3:6, I *Kings* 3:35, *Luke* 6:29, and *Matthew* 5:38, respectively. Something more than enculturation is at work in such references. These biblical phrases have acquired a distinct and legitimate legal meaning. These are not confessional statements, but evidence of the influence of the Bible in molding American law.

something along the lines of the publicist model. It is very unlikely that this approach would be advocated as the preferred approach to dealing with the role of religious convictions in judicial decisions in the United States. This is a pluralistic country without an officially recognized religious establishment to enforce orthodoxy; pandering to religious sentiments based upon political expediency is unlikely to be applauded. For the sake of a thorough discussion of the logical possibilities, however, a few brief comments are in order.

While the publicist model does not exclude, but rather includes, religious convictions in the justification of judicial decisions, it also threatens the integrity of judges, inviting judges to be what they are not. The publicist approach amounts to a kind of politically expedient hypocrisy. It also stands the trivialization concern on its head–rather than keep religious belief out of judicial opinions, religious belief is invoked in support of the political-religious establishment but without underlying conviction about its importance. Perhaps this approach is even more trivializing than exclusion–in the publicist view, religious conviction is admitted but without really mattering. Religion is co-opted in service to the dominant social group. Finally, the publicist model denies litigants and the public access to the real reasons for the judge's decision, foreclosing the opportunity for consideration, discussion, and challenge of the judge's true reasoning.

VI. OBJECTIONS TO THE WHOLIST MODEL

This section of the article will respond to a few common objections to the wholist model: coercion, inaccessibility, closed mindedness, and the Establishment Clause.

The wholist model has been challenged based upon charges that a judge is imposing her religious beliefs on others.[124] Since every judicial decision imposes the will of the court on at least one of the parties, it must not be the coercion, but the religious aspect of the wholistic approach that is objectionable. In response, however, when a judge bases her decision about what is best for society on a religious belief, she is not imposing a belief but a result on the party. The party is not compelled to agree with the reason for the decision. They are only bound by the court's ordered action. This is true of adjudication even where a judge does not rely upon a religious basis for her decision. Where a judge allows a religious conviction to inform a sentencing determination, the judge is not imposing

[124] *See* Calhoun, *supra* note 4.

a confessional belief on the defendant because she is not demanding assent to a faith commitment. Instead, the judge is doing justice from within a religious frame of reference. Even from an institutional perspective, this kind of reference is not coercive so long as it arises from the judge's own conscience. A state-mandated reference to the Bible would be another story, but a process open to all religious references is not coercive.

Another common objection to the wholist model is the inaccessibility of religious beliefs.[125] Proponents of this objection argue that judges should base their decisions on reasons that are accessible to all. By "accessible" they do not mean "understandable" to all. It is quite possible, with a little effort, to understand the beliefs of those with whom we disagree. We may not view the belief as warranted, but nonetheless we are able to grasp it. What these objectors mean is that the reasons should be shared by all. The appeal is usually made to common sense, universal rationality, or public reasons.[126] But this appeal is illusory in a pluralistic society such as the United States. As Alasdair MacIntyre demonstrated, standards of rationality differ based upon fundamental starting points:

> To be practically rational, so one contending party holds, is to act on the basis of calculations of the costs and benefits to oneself of each possible alternative course of action and its consequences. To be practically rational, affirms a rival party, is to act under those constraints which any rational person, capable of an impartiality which accords no particular privileges to one's own interest, would agree should be imposed. To be practically rational, so a third party contends, is to act in such a way as to achieve the ultimate and true good of human beings.[127]

These views can be labeled utilitarian, social contract, and natural law in approach. There is no neutral concept of rationality to which to appeal. Any proponent of a standard of rationality begins with a faith commitment. Stephen Carter makes a similar point, stating that the model of judging which requires accessibility is itself based on an inaccessible insight:

> [T]he liberal dialogue itself proceeds from a privileged insight–the insight that the state must be neutral among competing conceptions of the good. That is a nice ideal, but the ideal of neutrality, as even its proponents recognize, cannot be justified in its own terms. It must, in effect, be assumed. In that sense, it rests on untestable faith–or, put otherwise, on a privileged insight.[128]

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[125] *See* Idleman, *supra* note 2, at 443-47.

[126] *See* Greenawalt, *supra* note 3, at 150.

[127] ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 2 (1988).

[128] Carter, *supra* note 3, at 941-42 (footnote omitted).

Accepting the rules of discourse espoused by political liberalism grants privileged status to naturalistic religious beliefs under the guise of objectivity. A more democratic approach would not silence differing opinions based on rules that claim such references are out of bounds, but rather would allow for disclosure of presuppositions and discussion in the judicial forum.

The closed-mindedness of religious believers is also asserted as an objection to the wholist model.[129] Religious persons are portrayed as dogmatic at best, and irrational, fanatical people at worst, clinging to beliefs in blind faith. They are not viewed as open to persuasion by good arguments. Several commentators respond that the parody is overly broad–it does not match the reality of the religious experience of many people.[130] To be certain there are closed-minded religious persons, but there are also thoughtful religious persons open to persuasion, particularly when it comes to discerning the consequences of their fundamental commitments. Fundamental commitments may be non-negotiable, but believers are usually less recalcitrant about the political consequences of their fundamental commitments. There is no evidence that religious persons are more closed-minded than persons with strong beliefs. Many judges have strong convictions that they are unwilling to abandon that would not be characterized as religious.[131]

The final objection for consideration asserts that the wholist model violates the Establishment Clause of the First Amendment.[132] While the Ohio Supreme Court did not address the Establishment Clause in *Arnett*, it is natural to question how Judge Marsh's remarks can be squared with the anti-establishment principle. Therefore, some extended comments about this objection are in order.

The Supreme Court's interpretation of the Establishment Clause begins in *Everson v. Board of Education*[133] where the Court said, "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[134] The Court refined its approach in *Lemon v. Kurtzman*[135] with a three-prong test for determining whether government

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[129] *See* GREENAWALT, *supra* note 3, at 158-59.

[130] *See* Idleman, *supra* note 2, at 448-50.

[131] *See* Carter, *supra* note 3, at 942.

[132] *See* Modak-Truran, *supra* note 3, at 256-57.

[133] 330 U.S. 1 (1947).

[134] *Id.* at 15.

[135] 403 U.S. 602 (1971).

action runs afoul of the Establishment Clause: "[f]irst, 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.'"[136] The Supreme Court has sometimes ignored, and has even expressed disfavor for the *Lemon* test in recent decisions,[137] employing instead standards of indoctrination, neutrality, and endorsement to reach a number of decisions. For instance in *Agostini v. Felton*,[138] the Court said:

> [The government] program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. . . The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.[139]

In addition, the Supreme Court approached a few cases with a free speech analysis, prohibiting viewpoint discrimination against religious speech. For instance, in *Rosenberger v. Rector & Visitors of University of Virginia*,[140] the Court held that a University of Virginia policy denying funding to a student publication based upon its religious perspective violated the Free Speech Clause of the First Amendment.

> The prohibition on funding on behalf of publications that 'primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality,' in its ordinary and commonsense meaning, has a vast potential reach. . . . Were the prohibition applied with much vigor at all, it would bar

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[136] *Id.* at 612-13 (citations omitted).

[137] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting):

> Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called Lemon test, see Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), which has received well-earned criticism from many Members of this Court. See, e.g., County of Allegheny, 492 U.S., at 655-656, 109 S.Ct., at 3134 (opinion of Kennedy, J.); Edwards v. Aguillard, supra, 482 U.S., at 636-640, 107 S.Ct., at 2605-2607 (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S., at 108-112, 105 S.Ct., at 2516-2518 (Rehnquist, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426-430, 105 S.Ct. 3232, 3245-3247, 87 L.Ed.2d 290 (1985) (O'Connor, J., dissenting); Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 768-769, 96 S.Ct. 2337, 2355, 49 L.Ed.2d 179 (1976) (White, J., concurring in judgment). The Court today demonstrates the irrelevance of Lemon by essentially ignoring it, see ante, at 2655, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.

[138] 521 U.S. 203 (1997).

[139] *Id.* at 234-35 (citation omitted).

[140] 515 U.S. 819 (1995). *See also* Widmar v. Vincent, 454 U.S. 263 (1981).

> funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes. And if the regulation covers, as the University says it does,...those student journalistic efforts that primarily manifest or promote a belief that there is no deity and no ultimate reality, then undergraduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications. If any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy.[141]

Does the Establishment Clause prohibit a judge from referring to a biblical text to assist with the weighing of statutory sentencing factors? The answer is difficult to discern. It seems clear that the Establishment Clause applies to judges no less than other government officials,[142] but determining how it applies is a difficult task. Some religious comments by judges have survived scrutiny, while other religious remarks have not passed muster.

In *Marsh v. Chambers*,[143] the Supreme Court refused to find that opening legislative sessions with prayer violates the Establishment Clause. The Court made broad comments about public prayer by government officials that could support judicial prayers:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court.[144]

This language has been cited in support of judicial prayer where prayer served a non-sectarian, secular purpose, such as solemnizing, dignifying, or bringing order to the proceedings.[145] One lower court has found, however,

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[141] *Id.* at 836-37 (alterations in original).

[142] *See* Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. 1997) (stating "[t]he First Amendment applies to any application of state power, including judicial decision on a state's common law").

[143] 463 U.S. 783 (1983).

[144] *Id.* at 786.

[145] *See, e.g.*, Martinez v. State, 984 P.2d 813 (Okla. Crim. App. 1999); March v. State, 458 So.2d 308, 310 (Fla. Dist. Ct. App. 1984). Proponents of Establishment Clause arguments also have failed to prevail because of lack of standing and lack of prejudicial harm. *See, e.g.*, State v. Bjorklund, 604 N.W.2d 169, 221-22 (Neb. 2000); Hill v. Cox, 424 S.E.2d 201 (N.C. Ct. App. 1993).

that the practice of beginning court sessions with prayer violates the Establishment Clause :

> [C]ontrolling caselaw suggests that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test. . . . Even assuming, *arguendo*, that [the judge's] actions survive the first prong of the *Lemon* test, we would still find that the prayer. . . fails the second and third prongs of *Lemon v. Kurtzman*. . . . [U]nder the second prong of *Lemon*, . . . we must focus on how his prayer was perceived. When a judge sits on the bench, says 'Let us pause for a moment of prayer,' and proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion. . . . The testimony at trial showed that persons who have heard [the judge's] prayer in court felt that the judge wanted those present to pray with him and felt that the judge was endorsing religion. . . . The third prong of the *Lemon* test asks whether the challenged practice results in excessive entanglement of the government with religion. It is the view of this court that when a judge prays in court, there is necessarily an excessive entanglement of the court with religion. . . . For the judge to start each day with prayer is to inject religion into the judicial process and destroy the appearance of neutrality. . . . [The judge's] daily deliverance in court of a prayer that he himself composed certainly results in an ongoing, day-to-day merging of judicial and religious functions.[146]

Turning to the decision making of trial courts, there does not appear to be a case holding that a judge's use of a religious belief as a decisional factor violates the Establishment Clause.[147] A number of approaches to the issue are possible. Applying the no-aid-to-religion rule of *Everson* would push the Establishment Clause analysis toward a strict separation of law and religion, prohibiting wholist judges from making explicit reference to any religious text in a dispositive or possibly any other manner. In this view, any injection of religious beliefs or texts could be viewed as impermissible because it aids religion.[148] It is unlikely, however, that the

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[146] North Carolina Civil Liberties Union Found. v. Constangy, 947 F.2d 1145, 1150-1152 (4th Cir. 1991). Judicial prayers may also be found objectionable on due process grounds, for instance, where the prayers tainted the impartiality of the proceedings. *See* March v. State, 458 So.2d 308, 310 (Fla. Dist. Ct. App. 1984).

[147] *See* Idleman, *supra* note 52, at 537, 555.

[148] *See* State v. Pattno, 579 N.W.2d 503, 508-09 (Neb. 1998), *cert. denied*, 525 U.S. 1068 (1999).

> Also problematic with the trial judge's use of biblical scripture is the fact that from its very inception, this country has recognized the importance of separation of church and state. Allowing a court to recite scripture, and thereby proclaim its interpretation of that scripture, implies that the court is advancing its own religious views from the bench."

Id. The court did not, however, support this language with any Establishment Clause analysis. In addition, the Establishment Clause implication is not necessary to the court's decision, which focused on the due process aspects of the situation, specifically, the relevance of the biblical quotation and the lack of judicial impartiality.

Supreme Court would rely upon *Everson* without taking account of its progeny which temper its simple no-aid rule with doses of "accommodation" and "benevolent neutrality."[149]

Although the *Lemon* test brings more complexity to the analysis of the Establishment Clause, the result of its application to *Arnett* is unclear. An Establishment Clause violation might be justified on the basis of any of the three prongs of the test; however, solid counter arguments also can be made that the biblical reference should survive scrutiny under the *Lemon* test.

First, the biblical reference in *Arnett* could be viewed as having a religious purpose, rather than secular purpose. It was clearly motivated by Judge Marsh's religious conviction. On the other hand, the religious reference also had a judicial purpose–it assisted Judge Marsh with the weighing of the statutory sentencing factors. While a religious aspect is clearly evident, it is not the exclusive, or even the predominant, aspect of the reference. Judge Marsh did not quote the Bible to convert or condemn Mr. Arnett. The reason for the remark was judicial. She quoted the Bible to do justice within her frame of reference.

Second, the expression of approval for a religious text might also be viewed as having the primary effect of advancing religion. It advances the religious perspective of the judge on the matter of punishment. Once again, however, the primary purpose of the quotation was not confessional, but judicial. Judge Marsh did not ask the defendant or anyone else present to join in her belief or approval of her action. She simply expressed a personal reason for her decision within the bounds of fairness and her discretion.

Finally, the mixing of religious and secular concerns brought about by the application of Matthew 18:5-6 to the sentencing of Mr. Arnett might also be viewed as an excessive entanglement of government and religion.[150]

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[149] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

[150] The brief filed by the American Civil Liberties Union in *Arnett* made an Establishment Clause argument with an entanglement thrust:

> [I]f a judge sentences a defendant based on religious views, on appeal can the defendant contest the judge's religious interpretations or raise differing theological interpretations? The appellate court would then be required to determine which theological position is right, or at least whether the judge properly interpreted and applied the biblical passage used. Courts would be confronted with issues such as which religious texts should be used, which religious principles take precedence over others, and which interpretations of the religious text are valid. In this case, the Court of Appeals would have to determine whether the Bible really asserts such harsh treatment for child molesters and whether other sections of the Bible advocate forgiveness for sinners and then determine which provision takes precedence. A court of law is not the proper forum for such analysis.
>
> The establishment clause prohibits courts from answering any of these theological questions and from taking any role in determining the merits of any religious debate. Civil

The interpretation of a religious text by a judge involves the government with that religious text. Even assuming, however, that a biblical quotation "entangles" judicial and religious matters, it should not be viewed as "excessive." Rather, it should constitute a permissible acknowledgment that "[w]e are a religious people."[151] For a wholist judge like Judge Marsh, the religious and secular are inevitably intertwined. Government should "make room for as wide a variety of beliefs and creeds" as possible in our public forums, even in the courts.[152] Otherwise, they will become hostile toward religion. In any event, the biblical reference is not "entangling" if the concern is with government evaluation of a religious belief or practice. Judge Marsh's reasons need not be attributed to the government itself. Institutional involvement can be avoided by leaving the propriety of such references to the discretion of the sentencing judge and barring appellate court reviews of such religious remarks so long as they are within the bounds of due process.

Judge Marsh's biblical quotation could also survive scrutiny under the indoctrination, neutrality, and endorsement standards currently applied by the Supreme Court. First, Judge Marsh did not seek to indoctrinate the defendant or any other person present into her religious belief or practice. The quotation clearly represented Judge Marsh's personal struggle with the sentencing decision. Mr. Arnett was not required to assent to it; he was only bound by the result. He was not treated differently because of his

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> courts are prohibited from determining 'matters at the very core of a religion–the interpretation of particular church doctrines and the importance of those doctrines to the religion.' Presbyterian Church of the United States v. Mary Elizabeth Blue Hall Mem. Presbyterian Church (1969), 393 U.S. 440, 450. Just as the First Amendment "prohibits courts from resolving property disputes on the basis of religious doctrine and practice[,]" Jones v. Wolf (1979), 443 U.S. 595, 602, so too does it prohibit courts from imposing sentencing determinations on the basis of religious doctrine and belief.

Brief of American Civil Liberties Union of Ohio Foundation, Inc., *amicus curiae*, at 7-8; State v. Arnett, 724 N.E.2d 793 (Ohio 2000) (No. 99-468) (on file with the *University of Dayton Law Review*).

This argument has some merit. *See* Heitkamp v. Family Life Serv., Inc., 616 N.W.2d 826 (N.D. 2000) (standing for the proposition that courts should not be involved in interpreting church doctrines and texts in the context of ecclesiastical controversies). The argument goes on to point out the difficulties with appellate court review of theological interpretations of sentencing judges. This much squares with existing precedent. The ACLU's argument, however, goes wrong with its assumption that the problems associated with appellate court review of theological interpretations by sentencing judges applies to judicial decision making by sentencing judges themselves. The solution to the "problem" is not to prohibit sentencing judges from referring to religious texts in the justifications of their decisions, but rather to prohibit appellate court review of matters within the realm of the sentencing judge's discretion.

[151] Zorach v. Clauson, 343 U.S. 306, 313 (1951).

[152] *See id.*

religious beliefs. It seems clear that a defendant of any religious belief who pled guilty to a similar offense under the same circumstances would have been treated in the same manner.[153]

Second, permitting a biblical reference is neutral if judges of all faiths can speak based on their faith within the realm of discretion created by the sentencing statute. Judges of all faiths should have equal access to this forum. A state mandate that a judge consider a religious text would violate the Establishment Clause, but a judicial forum open to any, all, or no religious text does not run afoul of the anti-establishment principle.

Finally, Judge Marsh clearly affiliated herself with a religious text. Whether her quotation should be viewed as a governmental endorsement of religion is a close call. One approach would be to view her remarks as those of the government itself only with respect to the sentence, not in the reasons therefor. Another approach would be to attribute her remarks to the government but permit them because of the openness of the realm of discretion to religious references. Allowing judges of all faiths to make religious references about matters within the realm of their discretion grants all religious beliefs equal access to the realm of discretion, negating any general preference on the part of the government. Alternatively, Judge Marsh's religious remarks could be attributed to the government but permitted because the predominant function of the reference was judicial, rather than confessional. The biblical text was not used to evaluate a religious belief of the defendant or to compel adherence to a religious belief by the defendant, rather it was used to assist Judge Marsh with her judicial task of determining the appropriate sentence for the defendant. Judge Marsh's religious quotation would pass muster under either approach. Her remarks were within the realm of discretion and functioned in a predominantly judicial way.

These Establishment Clause interpretations dovetail nicely with other Constitutional provisions touching upon religious liberty–the Free Speech, Free Exercise, and Religious Tests Clauses. First, viewpoint discrimination prohibited by *Rosenberger*[154] could be applied to the religious remarks made by a sentencing judge if the realm of discretion created by the sentencing statute is viewed as a forum for personal judgment. A rule prohibiting all religious remarks within this realm of discretion would constitute viewpoint discrimination.

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[153] *See* letter from Melba D. Marsh to Chief Justice Moyer, *supra* note 29, at 2.

[154] 515 U.S. 819, 836-37 (1995).

Second, the free exercise rights of government officials could validate religious comments by judges. In *McDaniel v. Paty*,[155] the Supreme Court addressed religious liberty of state legislators:

> Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.[156]

This religious liberty should apply to courts. If so, a judge would not be barred from expressing faith-based reasons for a sentencing determination when the statute grants the judge the discretion to weigh statutory factors based upon their personal judgment.

Finally, the Religious Tests Clause of the Constitution states that "[n]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[157] This clause could be used to support religious expression of judges. A prohibition thereon could unduly constrain "religious" judges, leading to recusals and withdrawals, or even exclusion, from the judiciary. At the very least, a *per se* prohibition on religious references runs counter to the spirit of this clause. Judges should be able to make sentencing decisions that are consistent with their consciences; it is an important part of what they bring to the bench.

In conclusion, there are a number of ways to interpret the religious liberty clauses of the Constitution that support the permissibility of Judge Marsh's biblical quotation during the sentencing colloquy. The aims of the Establishment, Free Exercise, Free Speech, and Religious Test Clause are best served by an approach promoting a pluralistic public sphere where judges of all faiths have equal access to judicial office and equal opportunity to act upon their confessions. This approach creates room for wholist, separatist, and privatist judges to speak about justice from their hearts, whatever their confessional or jurisprudential commitments.

VII. LIMITS ON JUDICIAL REFERENCE TO RELIGIOUS TEXTS

The foregoing advocacy of a wholistic approach to judicial decision making is not meant to imply that judicial reference to religious texts

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[155] 435 U.S. 618 (1977).

[156] *Id.* at 641 (citations omitted).

[157] U.S. CONST. art. VI, cl. 3.

always leads to the right result; it is possible for religious texts to be cited in support of the wrong judicial result. Nor is it meant to imply that it is always appropriate; there may be times when ethical aspirations or political politeness call for the exercise of self-restraint in making such references. Legal correctness and ethical appropriateness should inform the exercise of a judge's discretion. Furthermore, judicial use of religious texts should be limited by the norms of the office they hold, such as establishing justice, acting with integrity, remaining impartial, considering the arguments of the parties, basing decisions upon admitted evidence, exercising discretion within the bounds of fairness, and accounting for applicable law. Several of these limits are particularly relevant to the *Arnett* case.

First, judges must act like judges. They hold a judicial office rather than a spiritual office. Therefore, they must not substitute sermons for judicial analysis. The actions of the trial judge in *Bakker* could be viewed as a violation of this principle because he invoked the condemnation of the religious community, as might be done in a sermon, upon the defendant.[158] Judges acting in this manner are not acting as judges but as prelates.[159] Judge Marsh's conduct, on the other hand, was consistent with her judicial office. Her quotation of Matthew 18:5-6 appeared at the end of a sentencing hearing that thoroughly considered the relevant sentencing factors and she used the passage in a judicial, rather than spiritual, way. She used Jesus' words to speak of the appropriate temporal sentence for a man who repeatedly raped a young child, rather than as Jesus himself used them to speak of the eternal consequences of offending a child. It is true that this usage related a religious text to a judicial action, but it was judicial reasoning nonetheless.

Second, judges must act with professional and personal integrity. They must not collapse their judicial and personal views of the appropriate outcome in the cases they decide. While their personal beliefs may inform, direct, or shape their understanding of the law, the judicial office they hold calls for differentiated thinking and action, thinking and acting like a judge. The sentencing hearing transcript reflects a careful consideration of the statutory factors as they applied to the task of sentencing Mr. Arnett. The fact that Judge Marsh's concluding remarks were stated in religious terms does not mean that she substituted her personal view of the punishment Mr. Arnett deserved for the proper legal determination of his sentence. Instead, it demonstrates her resolve to remain faithful to her personal and professional convictions while applying the appropriate legal standards.

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[158] *See* United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991).

[159] *Cf.* March v. State, 458 So. 2d 308, 310 (Fla. Dist. Ct. App. 1984).

Third, judges must account for relevant statutes and case law. These materials constrain their decisions. The *Arnett* court reminded sentencing judges of the limits of discretion with a quotation from *The Nature of Judicial Process* by Justice Cardozo:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal beauty or goodness. . . . He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life.' Wide enough in all conscience is the field of discretion that remains.[160]

While there is often room for the exercise of discretion or interpretation, the law exerts an influence that presses toward common results. In the instant case, while Judge Marsh turned to an additional source, she considered the statutory factors.[161] By doing so, she acted consistent with her obligation under the law. The influence of religious conviction operated within the boundaries established by the statute.

The Ohio Supreme Court's opinion in *Arnett* limited the role of religious references to the realm of lawful sentences.[162] This raises some interesting questions. What if Judge Marsh had imposed a sentence outside the parameters of the sentencing statute? What if her faith had served as a trump, overriding applicable law? What if Judge Marsh had cast Mr. Arnett into the depths of the sea, sentencing him to death based upon Matthew 18:5-6? What if, based upon Romans 12:19, Judge Marsh had refused to impose a sentence? These actions would be inconsistent with her judicial role. She is bound to uphold the law and abide by a judicial code of conduct. Still, a judge may feel morally compelled to do that which is unlawful or unprofessional. If she were to take such action, she must accept the consequences. She would probably be overruled, perhaps disciplined. But if her action attracts attention and arouses the conscience of the community, it may prompt reform of the law.[163] For the purposes of this discussion, however, it is important to note that she would have been in error not because of the religious basis for her action, but because she exceeded the bounds of the law.

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[160] State v. Arnett, 724 N.E.2d 793, 804-05 (Ohio 2000) (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1991).

[161] *See* tr. at 52.

[162] *See Arnett*, 724 N.E.2d at 799.

[163] *See* United States v. Lynch, 952 F. Supp. 167, 170-72, nn. 3-4 (S.D.N.Y. 1997) (providing a recent example of a judge abandoning the law in favor of religious beliefs). For commentary, see Michael W. McConnell, *Breaking the Law, Bending the Law*, FIRST THINGS June-July 1997, at 13.

Finally, sentencing judges must remain impartial. They must not set aside their role as an impartial tribunal. Impartiality has several dimensions. In *Arnett*, the two most important aspects of impartiality were Judge Marsh's view of the defendant and her judicial role. Regarding the defendant, she treated him as any other defendant, without regard to his religious persuasion.[164] Defendants should not be treated differently based upon their race, ethnicity, or religion. Mr. Arnett's religion was irrelevant to Judge Marsh's sentencing determination. Her own religious perspective by itself did not constitute bias or prejudice. With regard to the judicial role, sentencing judges must act for the community, not to vindicate their own sense of personal offense, as if they were a party to the case. The trial judge in *Bakker* set aside his impartiality by saying "those of us who do have a religion are ridiculed as being saps. . . ."[165] This language made it seem as though he had become a party to the case, expressing his personal animus toward the defendant. Read in the context of Judge Marsh's consideration of the views of family, friends, employer, doctor, victim's parents, and the victim herself, Judge Marsh's reference to the Bible expressed the community's concern for protecting its children, rather than personal animosity toward Mr. Arnett.[166] She, therefore, maintained her impartiality.

VIII. CONCLUSION

It is common to claim that religion has no place in public life. *Arnett* dealt with this assertion in the context of judicial sentencing. The appellate court's decision held that Judge Marsh acted outside Ohio's sentencing statute and violated the defendant's right to due process by referring to the Bible.[167] As *amicus* on appeal to the Ohio Supreme Court, this author urged the court to consider the underlying issue of the proper role of religious belief in judicial decision making before addressing the due process and sentencing statute issues.[168] At this level, judges might adopt separatist, privatist, publicist, or wholist approaches, or some variation thereof when incorporating religious beliefs in judicial decision making. While this author believes that the wholist model is the best model, this

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[164] *See Arnett*, 724 N.E.2d at 798.

[165] United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991).

[166] *See* tr. at 48-51.

[167] State v. Arnett, Nos. C-980172 & C-980173, 1999 Ohio App. LEXIS 295, at *2 (Ohio Ct. App. Feb. 5, 1999).

[168] Brief of Mark B. Greenlee, *amicus curiae*, at 2, State v. Arnett, 724 N.E.2d 793 (Ohio 2000) (No. 99-468) (on file with the *University of Dayton Law Review*).

author did not seek the imposition of this view of decision making on all judges. Instead, the *amicus* argument was for a jurisprudence that makes room for all of these models to be employed by judges.[169] The Ohio Supreme Court did so by refusing to prohibit a biblical reference in support of a sentencing decision within the lawful parameters of the sentencing statute.[170] While the Ohio Supreme Court opinion was sympathetic to the wholist model, it did not mandate its adoption; rather, the *Arnett* decision allows judges to follow their conscience, whether separatist, privatist, publicist, or wholist, in the exercise of their discretion.[171] This posture toward judicial decision making led the Ohio Supreme Court to reject the argument that Judge Marsh had considered an impermissible factor in reaching her sentencing determination under Ohio's sentencing statute.[172] The court also rejected the assertion that the mere injection of religious belief into a sentencing colloquy is enough to establish a violation of due process.[173] Thus, the court permitted a religious belief to influence the weighing of statutory sentencing factors. Furthermore, this article has argued that Judge Marsh's religious remarks would survive scrutiny under the standards employed by the United States Supreme Court under the Establishment Clause of the First Amendment.[174]

In the end, *Arnett* was about direction, discretion, and diversity. The Ohio Supreme Court recognized the legitimacy of religious belief as a directing influence upon judicial decision-making. Therefore, the court did not constrain the discretion of sentencing judges with a *per se* rule that religious references are out of bounds.[175] However, the court did remind sentencing judges of the limits of discretion with its quotation of Justice Cardozo–"[a judge] is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness."[176] While Judge Marsh's comments were within the bounds of the field of discretion, and while Judge Marsh's religious remarks would survive scrutiny under the standards employed by the United States Supreme Court under the Establishment Clause of the First Amendment and Due Process Clause of the Fourteenth Amendment, there is wisdom in humility about the legal consequences of religious beliefs when they are applied in a pluralistic society. Despite this caveat,

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[169] *Id.* at 20, 32.

[170] *See State v. Arnett*, 724 N.E.2d 793, 800 (Ohio 2000).

[171] *See id.* at 800.

[172] See *id.* at 798, 800.

[173] *See id.* at 803.

[174] *See supra* text accompanying notes 132-53.

[175] *See Arnett*, 724 N.E.2d at 803.

[176] *Id.* at 804-05.

there are times when a judge may feel compelled to consider, and even disclose, religious reasons for a decision. They should be free to do so. Given the diversity of religious convictions represented by the judiciary, it would be bad public policy to prohibit all references to religious texts such as the Bible, Talmud, or Koran during sentencing proceedings. Rather, courts should seek to maintain a judiciary open to judges of all religious faiths where they are free to live out their faith consistent with their judicial office. Society benefits from the religious diversity of its judiciary. In sum, there is a role for religion in public life. Judge Marsh put the thrust of this article most succinctly: "Every judge brings his or her entire experience, which includes religious experience, to the bench when elected. There is no requirement that judges leave the religious part of themselves at the courthouse door before entering."[177] There is a role for faith on the bench.

[177] Letter from Melba D. Marsh to chief Justice Moyer, *supra* note 29, at 2.