The Religiously Devout Judge

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I. A Liberal Axiom

My subject is the religiously devout judge. I am especially gratified to be addressing this subject here at Notre Dame, where a few years ago, Governor Cuomo of New York gave a very important talk on the problems faced by religiously devout public officials in a nation strongly committed to religious pluralism.[1] His views on that occasion were quite powerfully put, although, as will become clear, he and I do not end up in the same place.

Governor Cuomo, I think, would say that it is wrong for any government official to take conscious account of her own religious understanding as she formulates policy. Indeed, I take that notion to be virtually an axiom of the liberal political consensus, and certainly of contemporary legal theory. It is just that axiom, however, that I propose to challenge.

I should like to begin by asking you to consider a hypothetical nominee for a federal judgeship. The nominee is known to be deeply religious. Among the teachings of her religion is a firm command to cherish and protect the sanctity of every human life, a proposition which causes her to reject abortion, the death penalty, and all forms of armed conflict except self-defense.

Her confirmation hearings, one might well imagine, would be pandemonium. Part of the reason would be her substantive policy views. Pro-choice forces would attack her. So would law-and-order advocates. And cold warriors. In that sense, her confirmation hearings would be like any others in these degenerate days in which would-be judges are asked in advance to tell the Senate and the public how they plan to vote.[2]

But there is one sense in which her confirmation hearings would very likely be different. She would probably be asked a question that went something like this: "If we confirm you and you become a judge, will you be able to separate your religious beliefs from the task of judging?" For the sake of convenience, I will call this *the separation question*. Now, she might respond to the separation question by saying, "Senator, I'm sorry, but my religion teaches me to use the levers of power to aid the oppressed, and if confirmed as a federal judge, I would have to follow that teaching." If she really wanted to be a judge, however, she would of course have to answer the question with a "Yes"—or better still, with a "Yes, Senator, my religious views are entirely a private matter, and they would not influence my public judicial views in any way."

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

2 *See* Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1189-95 (1988).

And that answer, if the Senators believed her, would take care of the separation question.

But should it? I am not so sure. Kent Greenawalt, in his very fine book on the role of religious convictions in the formation of public policy, asserts that there is in the United States a widely shared "assumption that one can be a seriously religious person *and* a liberal participant in liberal society."[3] He may be right about what most Americans think, but I fear that the coerced affirmative answer to the separation question potentially points in another direction. Greenawalt suggests that "occasional reliance by judges on religious convictions is not improper."[4] I would go further, and suggest that reliance by judges on their personal religious convictions is as proper as reliance on their personal moral convictions of any other kind.

For reasons that I will explain, the separation question, along with its required answer, carries an implicit trivialization of religious faith, and a denigration of religion as against other ways of knowing. For better or worse, we live in a nation in which judges are frequently expected to rely on moral knowledge in reaching their decisions, in constitutional law and elsewhere. The separation question is anti-religious in character unless religious knowledge can be shown to be different in some relevant way from other moral knowledge, a proposition usually assumed, but not argued for, in liberal theory.

The separation question loses its anti-religious character, I will suggest, only if one accepts a model of judging in which judges strive to reason and act without regard to their own moral convictions. Adopting that model would of course mean the abandonment of the "fundamental rights" prong of contemporary constitutional jurisprudence. If the courts are to continue to enunciate fundamental rights, however, then I really do think that we face a stark choice: we can permit judges to use all of their moral knowledge, including religious conviction, or we can denigrate religion.

II. Two Kinds of Judges

I want first to discuss two types of judges, whom I will call the *objective* judge and the *morally sensitive* judge. I hasten to add that I am not pretending to invent anything new, and that the names are simply convenient labels for what you will quickly recognize as ideal types, that is, aspirational models. The models, then, are not of what judges are, but of competing visions of what judges should strive to be. As will be seen, a different approach to the problem of the religiously devout citizen who wants to be a judge follows from each model.

A. *The Objective Judge*

The liberal ideal is an objective judge, but when one uses so controversial a word, it is important to define it with care. Objectivity, as I will

3 K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 216 (1988).

4 *Id.* at 239. Greenawalt devotes only three pages of his book to the problem of religious conviction in adjudication.

use the term, is a goal, not a description, and an objective judge is a judge who considers the goal both attainable and desirable.

The objective judge considers adjudication an exercise of interpretation, that is, the application to a text of a set of interpretive rules. The objective judge believes that the legal community of which she is a part shares a consensus on the interpretive rules that judges are to apply.[5] Her vision of her role is to discover the rules and to try to apply them to the cases that come before her.

These interpretive rules are supposed to yield relatively determinate results, which is another way of saying that the result of the interpretation should not depend in any significant way on the biases of the interpreter. The judge is thus not *making* the law, but *discovering* it. Obviously, to the extent that the public perception so vital in the confirmation process really holds judges to this standard, the hypothetical nominee who wants to be confirmed has little choice but to answer the separation question with a promise to keep her religious convictions to herself.

But take careful note of why the would-be objective judge makes this particular promise. In order to fit the objective model, she must in effect promise that she will strive to put aside *all* of her prejudices and preconceptions. Her religious preconceptions are simply one part of this personal moral knowledge that she must promise to ignore. If her personal religious convictions should somehow leak into her reasoning process, she will have failed, not because her convictions are religious, but because they are her personal convictions.

The objective-judge model, in short, does not treat moral knowledge with a religious base any differently from moral convictions formed by any other process. All of it is bias and preconception, and all of it is what the judge is supposed to ignore.

But while I must confess that I am one of those who is sometimes wistful for the quite fictitious objective model of judging, not many people believe any longer that judges are capable of putting to one side all of their preconceptions when they sit down to deliberate. Certainly not many legal scholars believe it.[6] It may even be that most people think the objective judge model is a bad idea. How else to explain the titanic battles that are sometimes waged over confirmation of judicial nominees believed by some to have the wrong set of moral values? If judges are, or are expected to be, morally sensitive, then the fact that religious prejudices distort the search for objectivity is not a reason to avoid them. In that case, it is necessary to look elsewhere for the reason.

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5 In this definition, I essentially follow Owen Fiss. *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); *see also* Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

6 Even Ronald Dworkin, perhaps the preeminent defender of something close to the objective judge model, is at pains to note that he makes no pretense that it is possible to put all preconceptions aside. *See* Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More*, in THE POLITICS OF INTERPRETATION 287 (W. Mitchell ed. 1983).

B. *The Morally Sensitive Judge*

The competing model of judging presents the ideal of a morally reflective judge, who engages quite self-consciously in a form of reasoning best described as moral philosophy. Indeed, there are cases in which, if there is to be a decision at all, a degree of reliance on moral conviction can scarcely be avoided, and might even be desirable.

The natural tendency of the legal scholar on hearing this claim might be to prepare for a diatribe about decisions in the so-called "fundamental rights" strand of constitutional cases, but I will postpone that diatribe for a moment, in order to point out that other fields of law, too, feature cases in which judges are called upon to give morally reasoned responses. Greenawalt offers the example of a judge who must decide under an immigration statute whether an applicant is of "good moral character."[7] Another example is the power of common-law judges to avoid enforcement of private agreements on the ground that they shock the conscience of the court.

But let me turn to my more particular concern, namely, the Supreme Court's fundamental rights jurisprudence, which seems to have legitimized a process through which constitutional judges enforce a sort of natural law in the name of enforcing the Constitution. It is a bit late in the day to argue that when judges decide cases involving such issues as reproductive freedom or reapportionment, they are searching for rights that are already there, just waiting to be discovered. On the contrary, whether the judge claims to be enforcing the community's moral norms or updating the moral vision of the Founders, it is quite evident that the judge cannot make such decisions without relying, at least in part, on her own moral knowledge. Indeed, it is surely the expectation that judges *will* rely on their own moral knowledge in such cases that leads to the grilling of judicial nominees about their feelings toward controversial precedents, and, sometimes, even toward controversial public policies.

In short, for better or for worse, there appears to be a widely shared expectation that judges will sometimes rely on personal moral knowledge. The question, then, is whether one can make sense of a rule prohibiting judges from relying on their moral knowledge if it happens to have an explicitly religious basis. This can only be done, as I mentioned at the outset, if we are able to demonstrate that religious knowledge is different from other moral knowledge in some way that is relevant to the task of judging. Even if religious knowledge *does* turn out to be different, if we nevertheless permit religiously devout citizens to take the bench, provided only that they offer an affirmative answer to the separation question, than we must also be assuming that the citizen is capable of sorting out the religious moral knowledge from moral knowledge of other kinds. It is to the investigation of these matters that I now turn.

7 K. GREENAWALT, *supra* note 3, at 240.

III. The Religiously Devout Judge

A. *The Establishment Clause Conundrum*

I would like now to return to the hypothetical with which I opened this paper and to imagine that the nominee has given the first answer that I mentioned: "Senator, I'm sorry, but my religion teaches me to use the levers of power to aid the oppressed, and if confirmed as a federal judge, I would have to follow that teaching." Liberal theory, as ordinarily understood, ought to find this an easy case. If the nominee cannot separate her religious biases from the rest of her moral knowledge, then she ought to withdraw her name from consideration. The formal constitutional argument that undergirds this proposition rests on the establishment clause. According to the Supreme Court, that clause commands "that the Government maintain strict neutrality, neither aiding nor opposing religion."[8]

In recent years, this neutrality principle has been read not simply to prohibit the imposition of religious ritual or belief, but to prohibit the government from acting out of religious conviction. The rule, evidently, is that citizens may hold religious convictions but may not act on them, and, in particular, may not use them as the basis for policy preferences. This is a very odd result in a nation premised on the freedom of religious belief, but it is difficult to find another line of reasoning that explains, for example, the court decisions striking down the teaching of scientific creationism in the public schools.[9] It is one thing to say that creationism is bad science, but the fact that it is bad science makes it only silly, not unconstitutional. Despite pages and pages of analysis, the only thing that any of the courts have really been able to add to the proposition that creationism is bad science is the fact—if it is a fact—that many of those who endorse creationism and many of the legislators who voted to have it taught in schools acted out of religious conviction.[10]

The reading of the establishment clause that permits, indeed encourages, inquiry into legislative motivation has recently come under challenge.[11] And well it should, because it was never anything but a rather tortured and unsatisfactory reading of the clause. As one critic has put the matter, there is good reason to think that "what the religion clauses of the first amendment were designed to do was not to remove religion and religious values from the arena of public debate, but to keep them there."[12] The establishment clause by its terms forbids the imposition of religious belief by the state, not statements of religious belief in

8 School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

9 *See* Edwards v. Aguillard, 482 U.S. 578 (1987). For another example of a recent decision that is most readily explained on motivational grounds, see Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down "moment-of-silence" in public school classrooms).

10 *See* Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977.

11 The criticism of motivation as a test underlies much of the Greenawalt book discussed earlier. *See* K. GREENAWALT, *supra* note 3. Another important critique is Justice Scalia's dissent in Edwards v. Aguillard, 482 U.S. at 636-40 (Scalia, J., dissenting).

12 Van Wyk, *Liberalism, Religion and Politics*, PUB. AFF. Q., July 1987, at 59, 68 (paraphrasing Gamwell, *Religion and Reason in American Politics*, 2 J. LAW & RELIG. 326, 328 (1984)).

the course of public dialogue.[13] By equating acting out of religious motivation with imposing religious belief, the modern approach to the establishment clause seems, as John Ely has said in quite a different context, "to mistake a definition for a syllogism."[14] The distinction is one with more than semantic significance.

Consider, for example, the call by Reinhold Niebuhr and others back in the 1920's for the "Christianization" of American industry.[15] The word "Christianization" did not mean the imposition of ritual and doctrine; it meant, rather, the transformation of industry into a new form that would accord with a principle of respect for the human spirit that Niebuhr and the rest found lacking in industrial organization of the day. Critics called it socialism, or perhaps communism. But whatever it was, religious faith was plainly at its heart.

Niebuhr struck a chord, not only with any number of left-leaning Protestants, but also with a good number of socialists who had no religious position. Suppose the response had been greater; suppose that legislatures had begun enacting programs that matched the socialist spirit of "Christianization." The programs would be purely secular in their operation, and could certainly be justified in secular terms. But under an establishment clause that is read to equate acting out of religious motivation with imposing religious belief, I suppose that the programs would be unconstitutional, because both those who proposed them and many of those who voted for them would have done so out of religious conviction.

That is—or should be—a deeply troubling result. A rule holding that the religious convictions of the proponents are enough to render a statute unconstitutional represents a sweeping and tragic rejection of the deepest beliefs of tens of millions of Americans, who are being told, in effect, that their views do not matter. If I might beg your indulgence while I quote myself briefly, I put the matter this way in an earlier paper:

> In a nation that prides itself on cherishing religious freedom, it is something of a puzzle that a Communist or a Republican may try to have his worldview reflected in the nation's law, but a religionist cannot; that one whose basic tool for understanding the world is empiricism may seek to have her discoveries taught in the schools, but one whose basic tool is Scripture cannot; that one whose conscience moves him to doubt the validity of the social science curriculum may move to have it changed, but one whose religious conviction moves her to doubt the validity of the natural science curriculum may not.[16]

All of this is accomplished, as I said before, in the name of a principle of neutrality. But if neutrality actually requires such a result, then it must have very little to do with the free exercise of religion, and a great deal to do with keeping religion in its place. The danger is that the establish-

13 *See* McConnell, *Why 'Separation' Is Not the Key to Church-State Relations*, 106 CHRISTIAN CENTURY 43 (1989).

14 Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973).

15 *See* R. FOX, REINHOLD NIEBUHR: A BIOGRAPHY 62-80 (1985).

16 Carter, *supra* note 10, at 985-86.

ment clause might be on the verge of becoming not anti-establishment, but simply anti-religion.

I recognize that that is a fairly harsh criticism, and I would like to take a moment to explain it. One of the difficulties in contemporary first amendment jurisprudence, as others have pointed out, is that the establishment clause seems to be on the verge of swallowing the free exercise clause; it is as though the neutrality commanded by the establishment clause constitutes a hostility toward the freedom protected by the free exercise clause.[17] If the religious conviction of proponents is seriously to become a ground for invalidating legislation, then tens of millions of Americans will be prohibited from demanding government action in accord with their consciences, not because the dictates of their consciences are wrong on the merits, but because their consciences have been formed in the wrong way. They have not had their eyes on the proper conception of the public good. And while a few smart theorists have tried to demonstrate that any government action based on preferences unrelated to the public good ought to be suspect,[18] the simple fact is that the only other times that the constitutional courts insist on knowing how consciences were formed are when the government stands accused of racial or sexual bias or of intentionally censoring speech.

That, then, is the camp in which this emerging view of the establishment clause places those whose religious convictions shape their policy views—among the bad guys, who evidently number racists, sexists, censors, and people who believe in God. The camp, you will note, is basically a *Carolene Products* camp. In *Carolene Products*, remember, the Supreme Court warned of the need for special judicial vigilance on behalf of "discrete and insular minorities" who might be excluded from the political processes because of prejudice.[19] By placing the religiously devout in this camp, the Court is saying that when religious conviction forms the basis for policy, it is very likely to be oppressive—the way that racial discrimination, for example, is oppressive—and is therefore suspect. That would be a nasty and anti-religious presumption even in the absence of the enormous contributions of religious leaders to virtually every important social movement in the nation's history; against that further background, the presumption is simply ludicrous. But it is there.

B. *The Celebration of Reason*

Now what, you may ask, has this to do with judging? The answer is that the separation question—the one, you recall, to which the nominee must respond in the affirmative—entails a set of assumptions about religious conviction that also underlie the modern approach to the establishment clause. The modern approach implicitly (sometimes explicitly) accepts the liberal proposition that religion is a distorting force in the public dialogue on which liberal theory depends. The liberal dialogue, so the theorists explain, is one in which reason ought to rule, and who-

17 *See* McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146 (1986).
18 *See* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).
19 United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

ever makes the best argument ought to win. But religious convictions are not permitted to play a role. The dialogue must be conducted in accord with a requirement of rationality.[20]

It is, of course, very old news to point out that the rationality requirement effectively privileges a materialistic, analytical form of reasoning over other ways of knowing. But it is particularly ironic that the rationality requirement is used to bar religious conviction from the debate, because freedom of religion is at least mentioned in the Constitution—rational dialogue is not. More to the point, as opinion surveys keep reminding us, religious faith is more widespread in the United States than in any other nation in the Western world. The effect of privileging rationality, however, is to skew the public dialogue that liberalism demands, so that everyone has a voice except those people whose epistemology rests on faith. If religiously devout citizens wish to enter the dialogue, they must eschew the way of knowing that guides every other aspect of their lives. They must instead adopt the epistemology of contemporary, scientistic liberalism, with its sharp distinction between facts and values and its commitment to ends-means rationality as a supposed mediating dialogic force.

A mediating force is thought necessary because of our commitment to religious pluralism. There is, after all, no single religion that might be called the American religion, and if not for the requirement of a rational dialogue (so the argument runs) individuals of different views would be unable to talk to one another, because they would share no common moral language. That, at least, is the theory. But it is not quite as self-evidently true as those of us raised on modern establishment clause jurisprudence are accustomed to thinking.

The idea that rationality is needed as a mediating force among irreconcilable religious beliefs—a proposition which modern liberal theorists state, but one for which they rarely argue—may have its roots in the Enlightenment understanding that religious disagreements more than once plunged the world into war. There is, however, no *a priori* reason to assume that individuals of different religions in the United States of the late twentieth century are equally unwilling to discuss their religious differences and resolve their policy differences short of armed conflict. And if the religiously devout are willing to try, then it is less clear that a mediating force is needed.[21] Indeed, the insistence of contemporary liberal philosophers, generally in the absence of argument, that religious faith shapes people's minds in ways so radically different that they cannot possibly engage in the dialogue unless they purge their biases is itself a kind of anti-religious prejudice.[22] Remarkably, and tragically, current law, and current legal scholarship, continue to suggest that such a prejudice is what the establishment clause commands.

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20 The dialogic model is a feature of Rawls, *see* JOHN RAWLS, A THEORY OF JUSTICE (1971); and becomes explicit in Ackerman, *see* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

21 The work of Jeffrey Stout has largely influenced this argument. *See* J. STOUT, THE FLIGHT FROM AUTHORITY 239-43 (1981).

22 *Cf.* MICHAEL J. PERRY, MORALITY, POLITICS & LAW 72-73 (1988) (suggesting the implausibility of "bracketing" one's most-deeply felt convictions).

C. *The Religious Mind*

The implicit message, then, that the constitutional argument sends to people who are religious is that in the public dialogue that is the liberal ideal, their views do not really matter. But even putting the insult to faith aside, the liberal insistence that judges and other government officials place religious conviction entirely to one side plainly misconceives the nature of faith. Religious faith is not something that can be shrugged off like an unattractive article of clothing. The very idea of devotion suggests a way of ordering all life and all knowledge, including, although not exclusively, moral knowledge. As Paul Tillich has put the point:

> Faith as ultimate concern is an act of the total personality. It happens in the center of the personal life and includes all its elements. Faith is the most centered act of the human mind. It is not a movement of a special section or a special function of man's total being. They all are united in the act of faith. But faith is not the sum total of their impacts. It transcends every special impact as well as the totality of them and it has itself a decisive impact on each of them.[23]

Once faith is recognized, in Tillich's terms, as "ultimate concern," the repeated liberal insistence that it be abandoned when the devout citizen enters into the public realm is not merely puzzling, but actually perverse. It is perverse because it asks the devout citizen to become another person, to abandon the most important aspect of her life. No one would imagine asking her to leave behind an arm or a leg in order to join her fellow citizens in their deliberations over policy; no one would ask her even to abandon moral or political conviction. But if her source of her conviction is faith, and if the faith is of religious dimension, then she must transform herself into another person—one who is not religiously devout.

Why does liberalism insist on excluding the religiously devout from its dialogue? Obviously, at one level, liberalism is genuinely concerned with the tyranny that might result from the government's religious motivation. The fear is that allowing religious conviction into the dialogue, we stand at the brink of a long and slippery slope. Near the bottom lies the so-called "Christian Amendment" to the Constitution, proposed frequently in the past, which would recognize, as fundamental American law, "the authority and law of Jesus Christ."[24] At the bottom of the slope lies something like the Islamic Republic of Iran—or perhaps that anarchic no-man's-land that the maps still insist is a nation called Lebanon.

These images are undeniably frightening ones. But slippery slopes, as Catharine MacKinnon has pointed out, are often constructed by those who plan to give someone else a push when she isn't looking.[25] And besides, slippery slopes are a problem only if you can't think of a way to

23 P. TILLICH, DYNAMICS OF FAITH 4 (1957).

24 *See* M. SILK, SPIRITUAL POLITICS: RELIGION AND AMERICA SINCE WORLD WAR II 99-100 (1988) The idea of declaring ours a Christian nation seems to have gained new life. *See* Shupe, *The Reconstructionist Movement on the New Christian Right*, 106 CHRISTIAN CENTURY 880 (1989).

25 *See Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 24 (1985) (panel discussion) (remarks of Catharine MacKinnon).

stay off of them.[26] One can permit religious conviction to play a role in some government decisions without therefore having to sustain all government decisions in which it plays a role. The Christian Amendment would be a horribly oppressive abuse of government power, but so would scores of other ideas that have nothing to do with religion. Those ideas are opposed because they are oppressive—and that's a perfectly adequate reason to oppose a Christian Amendment, too.

So let's step off the slippery slope, and suggest what seems to be a more sensible possibility, and one particularly relevant to the problem of the religiously devout judge who won't give the right answer to the separation question. Perhaps the liberal mistrust—let's call it what it is—the liberal mistrust for religious faith rests not, as is usually asserted, on a fear of what might be imposed, but instead on a fear about the process through which the religiously devout public official decides what to impose. This fear, I would suggest, has two closely related components: (1) concern about whether the religiously devout citizen is resting her judgment on some privileged insight, inaccessible to her fellow citizens, and (2) concern about whether the mind of the religiously devout citizen is open in the liberal sense, that is, amenable to reason. For reasons that I will explain, neither of these concerns distinguishes religious devotion from devotion to other moral principles. On the contrary, each concern applies equally well to the decision process of *any* individual guided by a personal moral compass.

(1) *Privileged Knowledge*—The liberal image of the religiously devout citizen seems to be one of an individual whose moral knowledge proceeds from a privileged insight that others do not or cannot share. The religiously devout citizen evidently has taken a peek at some holy text or listened to some holy interpreter, and has made up her mind accordingly, once and for all.

Now, in the first place, that is very much a caricature of how religion operates, particularly in the United States, with its strong tradition of religious dissent—a tradition that permeates even those denominations that supposedly are most authoritarian.[27] Moreover, the reason for the liberal distrust of privileged insights cannot really be the concern that others might refuse to accept the text as authoritative, for that pluralistic concern is (or ought to be) identical if the text is Mill or Locke or Lenin or Charles Murray. Nor can the reason be that others might find the text inaccessible, because that is *certainly* true if the text is Mill or Locke or Lenin or Murray.

Besides, the 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 idea, but the ideal of neutrality, as

26 Staying off the slope is formally a matter of finding limiting rules sufficiently determinate that a later interpreter will not stumble downward in the name of following precedent. *See* Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

27 *See* Rabkin, *Disestablished religion in America*, PUB. INTEREST, Winter 1987, at 124.

even its proponents recognize, cannot be justified in its own terms.[28] It must, in effect, be assumed. In that sense, it rests on untestable faith—or, put otherwise, on a privileged insight.

(2) *The Open Mind*—The other part of the liberal fear is the idea that people who are religious tend to be closed-minded. I take this to mean that people who base their moral convictions on religious belief do not readily abandon those beliefs in the face of liberal dialogue. I am quite sure that this is very often true, but it is equally true, I would think, of people of any strongly held convictions.

The fact that convictions will not be readily abandoned hardly seems a sensible reason for not permitting them to play a role in the dialogue. Kent Greenawalt, among others, has proposed that religious citizens who wish to take part in public discussion simply omit their privileged insights and argue on the merits—although he also prefers that secular liberals avoid the "privileged" insights of rationalism, and argue on the merits as well.[29] In this connection, I think there is much in Martin Marty's analysis:

> [R]eligionists who do not invoke the privileged insights of their revelation or magisterium can enhance and qualify rationality with community experience, intuition, attention to symbol, ritual and narrative. Of course, these communities and their spokespersons argue with one another. But so do philosophical rationalists. Argument, after all, contributes to the search for virtues and for ways to express them.[30]

But while what Marty and Greenawalt propose is sensible, there is another point as well. Even if the religiously devout citizen does say, in dialogue, "I believe this because God says it," there is a substantial set of dialogic responses that are different from "No, God doesn't"—although, I hasten to add, that's an answer, too. One quite obvious response is, "Do you really imagine that your God would mandate something so fundamentally unjust?" And if, as seems to me quite likely, the religiously devout citizen responds angrily, "What's so unjust about it?", a dialogue is already joined. But even if the citizen responds, "God's word is the only measure of Justice," that answer is not noticeably more diffident than an entire range of refusals by citizens of strong convictions to enter into dialogue with those who disagree with them.

The point is that whatever might be said about the religiously devout, there is no reason—or at least, once again, no *a priori* reason—to assume that they are more closed-minded than others of strong moral beliefs. Many citizens enter into public debate on the basis of assumptions that they are unwilling to have challenged. Sometimes they win, sometimes they lose, but only if they base their assumptions on a religious understanding is their point of view entirely excluded from public dialogue. And that is a distinction that it is time to eradicate.

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28 *Cf.* Ackerman, *What Is Neutral About Neutrality?*, 93 ETHICS 372, 387 (1983) ("it would be a category mistake to imagine that there could be a Neutral justification for the practice of Neutral justification").

29 *See* K. GREENAWALT, *supra* note 3.

30 Marty, *When My Virtue Doesn't Match Your Virtue*, 105 CHRISTIAN CENTURY 1094, 1096 (1988).

IV. Religious Conviction and Fundamental Rights

What, then, should this hypothetical judge do if confirmed? What does it mean to say that she can rely on her religious convictions? How is she to reason? How is she to write?

These questions, unhappily, are all too large for a short paper like this one. The easy way out, I suppose, is to say that she is to do exactly what other judges do, and when other judges would ordinarily rely on their moral knowledge, she is free to rely on hers, too. As Kent Greenawalt has pointed out, this reliance would not necessarily extend to the writing of opinions[31]—at least not if one believes, along with quite a number of students of the judicial process, that an opinion is not an *explanation* of how a decision was reached, but rather a formalized *justification* for it, reining in the judge by forcing her to articulate her decision in a professionally responsible way.

So if religious conviction plays a role at all, it would enter into the deliberative process, but not the process of justification. This distinction is actually quite important, because the requirement of justification in accordance with a set of professional norms is generally said to be a disciplining force on judges who might otherwise let their personal values run rampant. They might make decisions on the basis of moral conviction, but they must justify them in terms of the received norms of judging.

The religiously devout judge should be able to operate in the same way. If the case before the court involves determining whether the fourteenth amendment protects a particular fundamental right, other judges will proceed eventually to consider their personal values, even knowing as they must that they cannot put their personal values into the written opinion. The religiously devout judge would similarly proceed to her values, with the same caveat.

Now, of course, we ought to be uncomfortable with the idea that the religiously devout judge will proceed *at once* to her religious values—but only for the same reasons that we ought to be uncomfortable with the idea that *any* judge will proceed at once to her own values. Even the model of the morally sensitive judge does not propose an entire abandonment of the norms of judging. I do not suggest here what those norms are, but I do suggest that they ought to restrain judges whose moral knowledge has a religious basis and judges whose moral knowledge does not in exactly the same way. The idea, in short, is to treat all moral knowledge as one and once we decide to allow judges to rely on it, not to be fussy about its source.

I expect this proposal to make liberals uncomfortable, because the liberal uneasiness with religion is not readily overcome by brief, scholarly analysis. And yet, even if I have not convinced you that the religiously devout judge ought to be free to rest her moral knowledge on her religious faith, I hope that I have at least offered a plausible case for the proposition that there is no apparent reason to treat her religious faith differently from moral faiths of other kinds. The implication of this in-

31 K. GREENAWALT, *supra* note 3, at 239.

sight for the "do-the-right-thing" type of judicial review should be plain—either *all* judges should be free to rely on their moral knowledge as they make decisions, or *no* judges should.

The ideal of the objective judge was slain by the legal realists long before the critical legal studies movement resurrected it in order to kill it again. But the ghost of the objective judge refuses to go away. I doubt that the objective judge will die quietly, as long as liberals continue to think that letting a judge rest her decisions on a moral understanding is a good idea. Because once a judge's moral understanding is permitted to play a role, the liberal argument cannot distinguish religiously based knowledge from other moral knowledge, or at least, cannot do so without arguments that require a bit too much cognitive dissonance. The aspirational model of the objective judge might offer the only path to sanity. And if we continue to pursue distinctions as crazy as this one, a path to sanity will be a useful thing to have.