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Religiously Devout Judges: Issues of Personal Integrity and Public Benefit

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RELIGIOUSLY DEVOUT JUDGES: ISSUES OF PERSONAL INTEGRITY AND PUBLIC BENEFIT

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In an engaging and provocative article, Judge Wendell L. Griffen argues that religious values may properly influence judicial decisionmaking.[1] Judge Griffen makes a number of interesting observations, but I wish to focus on what I regard as his two most important points. First, he argues that the open and forthright use of religious values, as a source of moral knowledge in judicial decisionmaking, can enrich the decisionmaking process and thereby afford a public benefit—this because judicial decisions taking account of such values are more likely to be sound or just. Second, he argues that any legal rule or ethical standard that precludes judges from utilizing religious values in this fashion can "dehumanize[] religiously devout judges by requiring them to either abandon the role of religious faith in their concept of moral knowledge or falsely mask the operation of that faith in the deliberative process."[2]

I find myself in considerable sympathy with these two arguments, but I think it is important to recognize that neither of them can be applied in a universal or categorical manner. Instead, Judge Griffen's arguments must be qualified: The use of *certain sorts* of religious values can potentially enhance the process of judicial decisionmaking, and a rule or ethic forbidding the use of religious values can be "dehumanizing" for *certain sorts* of religiously devout judges. More specifically, I wish to suggest that the validity and strength of each of Judge Griffen's two major points depend on the nature and content of not only the jurisprudential philosophy, but also the religious understanding, of the particular judge in question.

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1. Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513 (1998).

2. *Id.* at 514.

As a preliminary matter, please note that I am focusing on a judge's use of his or her *own* religious values, not those of the community generally. Furthermore, I am focusing on cases in which more conventional sources of legal judgment (including, if relevant, historical or contemporary community values) are potentially "underdeterminate."[3] Such underdeterminate contexts might include, for example, cases addressing constitutional or statutory questions relating to abortion, assisted suicide, or same-sex marriage, when the relevant constitutional or statutory provisions are ambiguous and when there is no controlling judicial precedent on the matter at issue.[4]

With this focus in mind, let us examine Judge Griffen's two basic points, posing them as questions, and taking them in reverse order.

First, to what extent is a legal rule or ethical standard that precludes a judge from openly utilizing religious values in his or her decision-making "dehumanizing" to religiously devout judges? I think it may be helpful to think of this question in terms of *personal integrity*, drawing on Professor Stephen L. Carter's discussion of integrity in his book by that name.[5] Adapting Carter's notion of integrity, let me suggest that to act with integrity, a judge must (1) *discern* the right or best answer to the legal question that he or she is addressing; (2) *rule or vote* in accordance with that answer; and (3) *openly state the reasons* (in open court or, more likely, in a written opinion) by which he or she has determined that that answer is right or best.[6] Needless to say, this summary of the requirements of personal integrity, as applied to judges, is oversimplified, and it avoids a variety of complicated questions.[7] Even so, I think

3. *See* MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 102 (1997). "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.* (citing Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987)).

4. *Cf.* David Barringer, *Higher Authorities*, 82 A.B.A.J. 68, 70 (1996) (quoting Judge Thomas A. Wiseman Jr.) ("If there is no precedent, then you have to fall back on your belief in what is right.").

5. STEPHEN L. CARTER, INTEGRITY (1996).

6. Compare Professor Carter's general statement of the requirements of integrity: "Integrity, as I will use the term, requires three steps: (1) *discerning* what is right and what is wrong; (2) *acting* on what you have discerned, even at personal cost; and (3) *saying openly* that you are acting on your understanding of right from wrong." *Id.* at 7 (emphasis in original).

7. My summary ignores, for example, a distinction that might be drawn between the actual *explanation* of a judge's decision and the legal *justification* on which it is premised and defended. *See* Joan B. Gottschall, *Response to Judge Wendell Griffen*, 81 MARQ. L. REV. 533 (1998); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81

it is both adequate and helpful for purposes of the present inquiry.

Second, to what extent does the open and forthright use of religious values, as a source of moral knowledge in judicial decisionmaking, afford a *public benefit*, in the sense that it enriches the decisionmaking process and thereby results in a judicial decision that is more likely to be sound or just? To provide a public benefit in this sense, the religious value, at a minimum, must somehow be distinctive or different from the secular values that would otherwise be controlling. In other words, the religious value must make a difference. But making a difference is not necessarily good or bad. Whether the religious value makes a *positive* difference and thereby provides a public *benefit* through its influence on a judicial decision necessarily depends upon whether the religious value itself is sound or unsound, just or unjust.

To further the inquiry into these two questions—*i.e.,* the question of personal integrity and the question of public benefit—I would like to introduce and describe five hypothetical judges. Although the judges are hypothetical, they exemplify patterns of thinking that reflect the views of many actual judges in the contemporary United States.

In some respects, my five judges are similar in terms of their personal religiosity: Each judge is religious in the traditional sense and, indeed, devoutly religious. Thus, each sincerely accepts the essential tenets of some major strand of a traditional religious faith, such as Judaism, Roman Catholicism, or Protestantism, and each participates regularly in the worship and other activities of his or her religious congregation. The judges differ, however, not only in their particular religious beliefs, but also, and perhaps more importantly, in their jurisprudential philosophies and in the basic epistemic frameworks within which their religious beliefs reside.

The first judge, Judge A, is a strict legal positivist. Judge A rejects the very idea that legal issues can be "underdetermined" by conven-

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MARQ. L. REV. 537, 541-43 (1998); *cf.* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 143 (1995) (arguing that "sometimes judges may appropriately rely on personal moral convictions even though their opinions make it seem as if they are relying only on sources available in the same way to all judges"). I also ignore the issue of whether or how a judge on a multi-member court can act with integrity in either writing or joining a judicial opinion that does not fully reflect the legal answer and justificatory reasons that the judge would offer in an individual opinion. More generally, and more fundamentally, I am simply asserting that integrity requires a judge to act with the type of candor that I describe in the text. Although I believe that integrity does require this type of candor, I make no argument in defense of that proposition. For an interesting and sophisticated discussion of the issue of judicial candor, see Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).

tional legal sources, and he regards his task, in each case, as that of discerning the right or best legal answer by reference exclusively to those conventional sources.[8] His own moral values, including his religious values, are utterly irrelevant to this task, and he therefore believes that he should keep those values in check to the fullest extent possible.[9] If he cannot keep his values in check or if they otherwise create a moral conflict preventing him from rendering the decision that legal positivism requires, it might be necessary for the judge to recuse himself;[10] if the problem recurs, he might need to resign and seek another profession.

However religious he might be and whatever the nature and content of his religion, Judge A acts with integrity even as he excludes his religious values from any role in his judicial decisionmaking. In following his understanding of the demands of legal positivism, Judge A discerns

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8. *Cf.* Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383, 400-14 (1998) (discussing constitutional jurisprudence of Justices Antonin Scalia and Clarence Thomas); *see generally* Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 933-35 (1989) (describing and contrasting "the objective judge" and "the morally sensitive judge").

9. A judge might adopt the positivist position of Judge A, or something quite close to it, without declaring the utter irrelevance of his own moral values. Consider, for example, the views of Judge James L. Buckley:

> I recognize that the commands of the positive law are not always self-evident.... Nevertheless, whether these commands are clear or opaque, the same underlying principle applies. When faced with ambiguities, or with problems that fall within the interstices that inevitably exist within and between laws, a judge is necessarily called upon to exercise a large measure of discretion. In doing so, he will inevitably bring to that task everything that he is—the books he has read; his experience as spouse, parent, and public official; his understanding of the nature of man and the responsibilities of citizenship; his sense of justice; even his sense of humor.... But while his own experience will necessarily affect how he reads the law, it is a judge's task to discern the governing legal principles as objectively as he can, and then to apply them.

James L. Buckley, *The Catholic Public Servant*, FIRST THINGS, Feb. 1992, at 18, 19. For Judge Buckley, a judge's moral values are relevant primarily for the general disposition they provide. A judge's Catholicism, for example, might "nurture[] a respect for and acceptance of lawful authority and tradition,... cultivate[] a sense of work as vocation," and guard the judge against "a betrayal of trust." *Id.* at 20. But "judges have no license to insert their own views of what is right or just into constitutional or statutory law," nor "to smuggle religious doctrines into the law." *Id.*

10. For discussion of religious judges and the issue of recusal, in the particular context of Roman Catholic judges and the death penalty, see John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998); Richard B. Saphire, *Religion and Recusal*, 81 MARQ. L. REV. 351 (1998); Mark V. Tushnet, *Two Footnotes to Garvey and Coney: A Dilemma About Material Cooperation, and a Concern About the Nomination Process*, 81 MARQ. L. REV. 365 (1998); Robert W. Tuttle, *Death's Casuistry*, 81 MARQ. L. REV. 371 (1998).

the right or best answer to the legal question that he is addressing, rules or votes in accordance with that answer, and openly states the reasons by which he has determined that that answer is right or best. His religious values simply are not implicated. At the same time, of course, the judge's religious values cannot, and therefore do not, provide a public benefit by in any way enriching the process of judicial decisionmaking.

My second and third judges, Judges B and C, are not legal positivists, at least not to the extent of Judge A. In particular, they believe that the moral values of judges may sometimes play a role in judicial decisionmaking. But Judges B and C treat *religious* values as a special case, believing that judges should not rely on such values.[11] Judge B reaches this result for jurisprudential reasons, believing that for him to rely on his religious values would violate the Establishment Clause of the First Amendment, or at least would violate his citizenship or judicial obligations in a liberal democracy, such as the United States, that is religiously pluralistic.[12] Judge C reaches the same conclusion as Judge B. Her reasons, however, are not jurisprudential; instead, paradoxically, they are distinctly religious. Thus, her religious beliefs call for a strong separation of the religious from the secular and include a strong commitment to religious voluntarism—*i.e.*, "soul freedom"—on matters involving religious as opposed to secular obligations. As a matter of religious principle, Judge C believes that she cannot "impose" her religious values on others through the process of judicial decisionmaking, for to do so would be to deprive the legally "coerced" behavior of any *religious* value.[13]

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11. For judges who treat their religious values as a special case, it is essential that they be able to determine when their moral values are "religious" and when they are not. This is not always an easy task, especially for judges who regard religious and secular thinking as closely intertwined. *Cf.* Barringer, *supra* note 4, at 70 (describing the views of Judge Thomas A. Wiseman Jr., a Presbyterian, who "admits it is difficult to tell whether one's convictions have religious roots, noting that Sunday school, parental guidance and philosophy all figure as sources of his moral convictions"); *see generally* Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, *supra* note 7, at 539-41 (discussing the difficulties of defining religion in this and other contexts).

12. *Cf.* Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1083 (1990) (arguing that "respect for the diversity of faiths requires that judicial decisions not be made or justified on the basis of religious faith" and that such decisions instead "should be made and justified by public reasons that could be accepted by individuals from a diversity of faiths or no faith at all"). For an elaboration of possible constitutional and philosophical limitations on the use of religious values in judicial decisionmaking, see Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, *supra* note 7, at 551-63.

13. With respect to political as opposed to judicial action, Professor Samuel W. Calhoun has defended a religious position very similar to Judge C's. *See* Samuel W. Calhoun, *Conviction Without Imposition: A Response to Professor Greenawalt*, 9 J.L. & RELIG. 289 (1992).

As a result, all of my first three judges, each for different reasons, sincerely believe that their religious values should play no role in judicial decisionmaking, and all can exhibit integrity when they act accordingly in their rulings, votes, and opinions. At the same time, their religious values do not provide a public benefit by enriching the judicial process because their religious values do not affect that process at all. Judge C presents a minor exception to this last proposition, because she cites religious reasoning (and integrity might require her to do so publicly) as her basis for abstaining from reliance on religious grounds in her actual judicial decisionmaking. Thus, Judge C's religious values *affect* the judicial process, but only in a negative and confining sense. It is difficult to argue that they provide a public benefit by *enriching* the judicial process, *i.e.*, by promoting the adoption of judicial decisions that are sound or just. Her values support a particular understanding of religious voluntarism, and that understanding might be sound, but the substance of Judge C's judicial decisionmaking is no different than if she were not religious at all.

Like Judges B and C, my fourth judge, Judge D, agrees that the moral values of judges may play a role in judicial decisionmaking when more conventional sources of legal judgment are underdeterminate, and he also adopts a special approach for religious values. Judge D's special approach, however, does not exclude religious values altogether. Instead, he has concluded—for jurisprudential as well as religious reasons—that he should not rely on a religious ground of decision unless, in his view, a persuasive secular ground of decision also supports the same choice. Jurisprudentially, he believes that this limitation is required or suggested by the Establishment Clause or by a proper understanding of American political theory. Religiously, he believes that a religious ground for resolving a worldly problem is likely to be mistaken, *i.e.*, *religiously* mistaken, unless the religious ground is also supported by secular reasoning.[14]

14. In his recent book, Professor Michael J. Perry has defended, on jurisprudential as well as religious grounds, a position very similar to Judge D's. PERRY, *supra* note 3. For Perry's discussion of judicial decisionmaking in particular, see *id.* at 102-04. *See also* Mark Tushnet, *The Limits of the Involvement of Religion in the Body Politic*, *in* THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 191-220 (James E. Wood, Jr., & Derek Davis eds., 1991) (arguing that it is permissible for lawmakers to rely on religious justifications, but only if the laws they adopt are independently justifiable on secular grounds).

Although Judge D has two bases—jurisprudential and religious—for the position that he holds, a judge might find either basis, standing alone, to be sufficient to support the same view. Thus, I might have identified other hypothetical judges holding the same position as Judge D, but relying only on one basis or the other.

If a religious ground of decision *is* supported by secular as well as religious reasoning, however, Judge D believes that he may properly rely on the religious ground, in addition to the secular reasoning, as support for a judicial decision. In any such case, the demands of integrity require Judge D to openly state that he is relying on religious as well as secular reasons, for both sets of reasons have led him to determine what he regards as the right or best answer to the legal question that he is addressing. But Judge D's religious values play a decisional role, and therefore must be disclosed as a matter of personal integrity, only when they provide *additional* support for a decision that is *independently* supported on secular grounds that the judge finds persuasive. As a result of this limitation, it will be rare for the judge's religious values to play even a supplemental role in his process of decision. In terms of public benefit, Judge D's religious values will do relatively little to affect, much less enrich, the process of judicial decisionmaking.

Allow me next to introduce my fifth and final judge, Judge E. Judge E agrees with most of her hypothetical colleagues in rejecting strict legal positivism, but Judge E goes further, seeing no special need to confine her use of *religious* values. Thus, when more conventional sources of legal judgment are underdeterminate, Judge E believes that her religious values are appropriate grounds of decision no less than whatever other values she might hold. Jurisprudentially, she believes that this view is consistent with a proper understanding not only of the Establishment Clause, but also of American political theory.[15] From a religious perspective, moreover, Judge E disagrees with Judge D on the role of religion as a source of moral truth. In particular, she believes that religion is an *independent* source of truth, such that a religious ground for resolving a worldly problem may be sound even when it is *not* supported by secular reasoning.

To a far greater extent than my other hypothetical judges, Judge E is likely to find it difficult, if not impossible, to maintain personal integrity in the face of a rule or ethic that precludes her from openly utilizing religious values in her decisionmaking. As Judge Griffen argues, such a rule or ethic is likely to place Judge E in an untenable position: Either she must abandon her understanding of the right or best answer to the legal question that she is addressing—*i.e.*, the right or best answer from

15. *Cf.* Thomas L. Shaffer, *On Checking the Artifacts of Canaan: A Comment on Levinson's "Confrontation,"* 39 DEPAUL L. REV. 1133, 1142 (1990) ("Substantive pluralism, serious about moral values, would be a society in which moral beliefs are described, aired, and discussed, even in legislatures and in the courts. No moral belief would be silenced because it was also religious.").

both a jurisprudential and a religious perspective—or else she must conceal the actual role of her religious values in the process of judicial decisionmaking.[16] Neither alternative is consistent with the requirements of integrity. Each is "dehumanizing" in the sense Judge Griffen suggests.[17]

In the *absence* of a rule or ethic confining her reliance on religious values, however, Judge E may have considerably more to offer, in terms of public benefit, than any of my other hypothetical judges. Unlike the religious values of the others, Judge E's religious values may have a profound effect on her decisionmaking, leading her to decisions that she would not adopt on the basis of secular reasoning. But as I suggested at the outset, the fact that a judge's religious values make a difference is not necessarily good or bad. Whether this religious difference provides a public *benefit*, through the judicial decisions that it supports, depends upon whether the religious values themselves are sound or unsound, just or unjust.

In order to evaluate the public benefit that might accrue from Judge E's reliance on her religious values, we need to know more about Judge E and her religious understandings. Elsewhere I have set forth general

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16. *See* Griffen, *supra* note 1, at 514.

17. *See id.* Professor Kent Greenawalt has noted that it can be exceedingly difficult for individuals, in their internal, silent deliberations, to exclude their religious values when making decisions to which those values relate. *See* GREENAWALT, *supra* note 7, at 138. By contrast, Greenawalt claims, "*[s]peaking* without reference to religious convictions is not difficult." Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411, 1416 (1996) (emphasis in original). *See generally* GREENAWALT, *supra* note 7, at 134-39 (elaborating and defending a distinction between self-restraint in decision and self-restraint in advocacy).

As my discussion of Judge E implies, I think that keeping silent sometimes can be more difficult than Greenawalt suggests; integrity sometimes will demand that religious individuals, including religious judges, identify their religious values and explain their significance. This is not to deny that in our contemporary political culture, being candid about these matters likewise can be problematic for religious judges, at least if they are interested in professional sanction or advancement. *Cf.* Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1049 (1990) (arguing that Catholic nominees to the Supreme Court "have been forced to proclaim the practical meaninglessness" of their religion).

For whatever reasons, it is rare for judges in the contemporary United States to openly refer to religious values—whether their own or those of the culture—as support for their judicial decisions. *See* GREENAWALT, *supra* note 7, at 142-43. Nevertheless, some open references can be found, especially in concurring and dissenting opinions. *See* Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 475-77 (1993); *cf.* Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 TEX. TECH L. REV. 1139, 1147-57 (1996) (using law review article to identify and explain religious influences underlying certain of author's judicial opinions as Texas Supreme Court Justice).

criteria for evaluating religious contributions to American politics and law.[18] I think those criteria are also relevant for religious contributions to judicial decisionmaking—*i.e.*, if and to the extent that the judges' own religious values might properly be invoked. In particular, I think the most promising type of religiously informed judging would view religion as an independent source of moral truth, but a source to be tested and put in conversation with competing sources.[19] By recognizing the independent significance of religion as a source of moral truth, this form of judicial thinking would permit a judge's religion to play an important role in the process of judicial decisionmaking. At the same time, however, by placing his or her religious source of truth in conversation with competing sources—secular as well as religious—it would avoid the narrowness of religious fundamentalism, a narrowness that too often leads to moral understandings that are seriously incomplete, if not simply mistaken. If, as Judge Griffen argues, a judge should be "open-minded to all sources of truth,"[20] then it follows that no claims of truth, whether secular or religious, should be immune from challenge, criticism, or debate.[21]

General criteria of this sort might help us evaluate whether Judge E's reliance on her religious values would be likely to provide a public benefit. To complete the evaluation in any given case, however, we would need to decide whether Judge E's particular religious values, as applied to the case at hand, were sound or unsound, just or unjust. But how could we accomplish such an evaluation? More generally, how can we evaluate *any* form of moral reasoning, whether religious or otherwise?

As Professor Suzanna Sherry has written, "moral reasoning . . . can be good or bad."[22] Although Sherry limits herself to secular moral reasoning, her analysis and criteria actually apply to religious reasoning as

18. Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J. L. & RELIG. 1 (1993-94).

19. *See id.* at 13-21.

20. Griffen, *supra* note 1, at 518.

21. *Id.* at 518-19; *cf.* Idleman, *supra* note 17, at 479 ("a judge's evaluation of a religious value or assertion should conform to a thorough and balanced analysis, not unlike a judge's evaluation of any other source of insight"); *see generally* Howard J. Vogel, *The Judicial Oath and the American Creed: Comments on Sanford Levinson's The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1107, 1129 (1990) (arguing that religious faith, properly understood, "does not abandon reason, but rather welcomes it as an important guide in identifying idols along the way as well as those we carry in ourselves").

22. Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 474 (1996).

well. Thus, moral reasoning, whether secular or religious,

> can be good or bad. It can contain inconsistencies and failures to notice logically necessary connections. It can fit poorly with experience or with one's other beliefs, or have unpalatable implications. It can be based on faulty premises, unchallenged only because of cognitive negligence.[23]

Conversely, it might be logical. It might fit well with one's experiences. It might mesh with one's other beliefs or lead to an adjustment of those beliefs. Its implications might be attractive, and it might rest on premises that are sound.

In summary, then, religiously devout judges might—or might not—find it difficult to maintain personal integrity if they decline to rely on their religious values. And to the extent that they *do* rely on their religious values, this might—or might not—provide a public benefit by enriching the judicial process in a morally productive way. It all depends on the judges and the values that they hold.

23. *Id.* at 474-75 (footnotes omitted).