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MAY OFFICIALS THINK RELIGIOUSLY?

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I.

In a society that professes allegiance to the principle of separation of church and state, must that separation take place in thought as well as in deed? Professor Greenawalt argues persuasively that, even in a liberal democracy, citizen reliance on religious beliefs is permissible in making decisions regarding those issues for which rational argument alone provides no solution. If citizens may rely on the "nonrational" in thinking about issues of public policy, then they ought to be allowed to rely on that particular subset of the nonrational that is designated "religious."

Citizen preferences, however, do not translate directly into governmental action. In a representative democracy, numerous decisions are in fact made by legislators, judges, executives, administrators, and bureaucrats. It is fair to assume that individuals performing such functions have what John Simmons refers to as "positional duties"[1]—that is, obligations with respect to a particular position that differ from, or exceed, the obligations one may have as citizen *simpliciter*. When one assumes the role of a police officer, for example, one takes on special responsibilities actively to enforce the law, and when one assumes the role of legislator one becomes disabled from receiving gratuities for services rendered that we would not think impermissible for a waiter or taxi driver. As a general and preliminary matter, therefore, government officials of various types might very well be disabled from doing things as government officials that would be entirely permissible for them to do as mere citizens in a liberal democracy.

Thus, even if Professor Greenawalt correctly concludes that citizens in a liberal democracy may rely on religious principles in making decisions regarding a wide range of public policy matters, it does not follow that government officials may do the same thing

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1. A. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 12-23 (1979).

in exercising their official roles. Professor Greenawalt recognizes this as a separate question, but hints that for him the answer would be the same. At the conclusion of his paper, he notes that the view that legislators "sometimes can develop their own political positions" in reliance on religious convictions is a "fairly short" step,[2] and that "[t]he conclusion that legislation adopted on such grounds does not offend the religion guarantees of the Constitution is another fairly short step."[3]

Because I am in substantial agreement with Professor Greenawalt's major thesis concerning the permissibility of citizen reliance on religious convictions, I want to look more closely not at the thesis itself, but rather at these extrapolations to official action that, for him, are only short steps. I want to suggest not only that these steps are not that short, but also that they may be steps in the wrong direction. Perhaps implicit in the notion of a liberal democracy and in the establishment clause of the first amendment are positional obligations of officials that preclude them from relying on the very religious grounds on which they would be entitled to rely were they merely citizens deciding what political positions to hold. If officials have these positional duties, then perhaps they are obliged to rely on secular rather than religious reasons even within the realm of nonrational decision, the terrain on which Professor Greenawalt stakes his claim.

II.

If the analysis were to proceed entirely as an exercise in ideal theory,[4] the question of official reliance on religious convictions,

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2. Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011, 1065 (1986).

3. *Id.*

4. I avoid the distinction between theory and practice precisely because good theory will reflect actual practice. A theory that does not accurately reflect reality is, quite simply, a bad theory. *See* I. KANT, ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE (E. Ashton trans. 1974). Nevertheless, it is often philosophically useful to imagine a world consisting entirely of rational or just decisionmakers, or a world in which some other admittedly unrealistic behavioral assumption is used to help focus the philosophical question. This is the point of Rawls' distinction between ideal theory and nonideal theory, and it is this distinction that is most useful here. J. RAWLS, A THEORY OF JUSTICE 8-9, 245-47, 351-52 (1971); *see also* Radin, *Risk of Error Rules and Non-Ideal Justification*, in NOMOS XXVIII: JUSTIFICATION 33 (J. Pennock & J. Chapman eds. 1986).

whether those of the officials or those of their constituencies, might very well focus on the obligations of officials to act in ways that promote or seek some common ground. If the positional obligations of some officials are positional obligations with respect to the polity as a whole and to the state as an institution, rather than merely obligations to act as mouthpieces for voters in certain geographic areas, then officials may be obliged to rely on reasons for acting that transcend even the legitimate beliefs of only a subset of society. This is not to say that officials, even in the area of the nonrational, must never choose one nonrational position over another. Nor is it to say that these officials, in the exercise of their positional obligations as representatives of others, cannot incorporate into their decisions some of the nonrational preferences of their constituencies. Perhaps implicit in the idea of a liberal democracy, however, is an obligation of or an official to rely on reasons not that necessarily *are* held by all of the people, but that *could be* held by all of the people. Religious argument, to the extent that it intrinsically appeals to and includes those who share common religious presuppositions while simultaneously excluding those who do not subscribe to certain religious tenets, may very well fail this test. Religious argument may ultimately require addressees of the argument either to disagree or to give up their religious faith, in a way that secular argument in the realm of the nonrational does not. Religious decisionmaking by an official, therefore, may be of a different order than other forms of choosing between courses of action, even on nonrational grounds, and for that reason religious decisionmaking may be inconsistent with the obligations of an official in a liberal democracy.

At this point, the reference to "officials" becomes unacceptably general. If positional obligations are referred to those obligations plainly may vary with the position, and some officials occupy positions different from those occupied by others. Consider, for example, the obligations of a United States Senator from Massachusetts, the United States Attorney for the District of Massachusetts, an employee of the Internal Revenue Service's Boston Regional Office, and the commanding officer of the United States Army post at Fort Devens, Massachusetts. Similar examples could be drawn for state officials that would demonstrate that particular officials may have obligations to reflect particular constituencies that do not

parallel the obligations of public officials in general. Although elected legislators are entitled to filter the views of their constituencies to some extent, clearly the views of those constituencies play more of a part in a proper conception of these officials' legislative roles than they do with respect to members of the executive, judicial, or administrative branches of government.[5] Professor Greenawalt's small step thus may be small for the legislator but quite a bit larger for individuals whose official roles are not as easily defined in terms of constituent representation.

Exploring the full ramifications of this perspective is not my purpose here, and I couched the previous paragraphs in the subjunctive precisely because I want to leave the realm of ideal theory. Instead, I wish to assume that, as a matter of ideal theory, legislators and perhaps even some other public officials could legitimately rely on religious convictions with respect to some governmental decisions. This assumption made, I want to exit the arena of ideal theory, and look to the effect of a publicly acknowledged norm of official behavior that gives approval to reliance on religion with respect to at least some governmental decisions. The focus now is more behavioral than philosophical, and thus what I say here is necessarily contingent on my own nonscientific assessment of how other people think and behave. If my behavioral speculation is correct, then certain conclusions will follow inevitably. Even if I am wrong, however, I hope at least to outline how the inquiry must proceed.

III.

When contemplating the relationship of religion to politics, many people have their own favorite fears. That is, it is common when talking about this subject to refer to some particular conflation of religion and politics that all would consider condemnable. Some might think of the worst excesses of religious zeal in modern

5. I am not claiming that the conception that legislators are articulators of constituent views is the only plausible conception of a legislator's role in a representative democracy. I am saying merely that it is one such conception and that, under any version of that conception, the legislator's obligation to articulate constituent views, even if based on religious grounds, is greatest. As one departs from this conception of the legislative role, or considers officials other than legislators, one may find that the permissibility of reliance by officials on their *own* religious convictions decreases commensurately.

theocracies, and warn against the possibility of becoming another Iran in the grip of an Ayatollah. More realistically, some fear an environment in which the criminal law would prohibit all that is anathema to a particular religion and nothing that is not, in which public officials would use their preferred access to the media and other forums as an occasion to proselytize for religious views, in which authorities would use society's educational institutions to stress the advantages of some religions and the disadvantages of others, and in which a religious oath would become the effective prerequisite for holding various official positions.[6]

I emphasize that I am not claiming that Professor Greenawalt would view these hypothetical eventualities as any less dangerous than I. In fact, my point is precisely that, as to these and other examples, I assume he would agree with me that these are consequences to be avoided. The question then can be made more precise. Using terminology I have introduced elsewhere,[7] I want to refer to the assumed permissible reliance on religion by public officials as the *instant case*. Let us assume, therefore, that Professor Greenawalt's small step is a proper one and that, in the area of nonrational decisionmaking, legislators and other public officials may develop their own political positions and then take official action based on those positions, with reference to religious considerations. In contrast, we must imagine a *danger case*, such as the ones mentioned previously, in which religious involvement in political life is plainly excessive, unjustified, and inconsistent with the basic ideals of a liberal democratic society.

We now can focus more clearly on the central question in moving from ideal to nonideal theory. Is the likelihood of the danger case especially great if the first step to the instant case is taken or can the instant case be accepted with no greater risks than those

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6. Of course, article VI, clause 3, of the United States Constitution prohibits any "religious Test," and this provision, when combined with the first amendment, precludes the states and the federal government from engaging in "the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." Torcaso v. Watkins, 367 U.S. 488, 494 (1961) (footnote omitted). Nevertheless, what is prohibited by law could become required by the political process, in slightly less direct ways.

7. Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

normally attendant to the uncertainties of the future and of human behavior? Is the move from the first step into the chasm merely a risk, like many others, that any power may be abused or taken too far,[8] or does some particular reason exist to suppose that in the case of separation of church and state the likelihood of slipping from that which is tolerable to that which is not particularly great?

One of the first factors to examine is the extent to which Professor Greenawalt's analysis requires the concept of rationality to bear virtually all of the weight in separating the areas in which religious factors properly may be part of a public official's analysis from the areas in which decisions, in his view, must be entirely secular. I am by no means denying the rational/nonrational distinction.[9] Instead, I *am* questioning the transferability of the rational/nonrational distinction from the realm of ideal theory to the realm of practice. If this distinction is particularly beyond the ken of either public officials or the population at large, then the slippage from ideal theory into practice may be greater than the slippage normally expected when an abstract formulation is applied to more concrete situations.

To suggest merely that a concept is elusive, or even that it is *particularly* elusive, is not sufficient. If that were the whole matter, one could expect that official mistakes of taking the nonrational to be rational would be counterbalanced by an equivalent number of mistakes of taking the rational to be nonrational. Of course, this is not the case. Although few religious people would deny the extent to which some aspects of religion simply must be taken on faith, I still feel confident in asserting that, for most people, the designation "rational" has positive emotive connotations and the designation "nonrational" is largely pejorative. If this is true, then the mistakes of underinclusion and the mistakes of overinclusion are unlikely to cancel each other. Note, however, that the skewing

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8. As Justice Story noted: "It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 344 (1816). More than a century later, Justice Holmes observed: "The power to tax is not the power to destroy while this Court sits." Panhandle Oil Co. v. Mississippi *ex rel.* Knox , 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

9. Perry, *Comments on "The Limits of Rationality and the Place of Religious conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1067 (1986).

cuts *against* the likelihood of the feared dangers. If rationality is taken to be good, and nonrationality to be bad, then embodying this distinction in a message to public officials that they may properly consider religious factors with reference to the nonrational realm of their actions, but not with reference to the rational realm, is likely to *reduce* the likelihood of going from the instant case to the danger case. If the message is that religious factors are appropriate only in the realm of the nonrational, and if the recipients of the message are likely to undercount the instances of the nonrational, then there is no reason to be especially afraid that officials will take Professor Greenawalt's message as a signal to "incorporate" the religious more than he would desire. As a result, focusing on the distinction between the rational and the nonrational does not justify fears of a particular risk of sliding from the instant case to any of the feared danger cases.

IV.

The inquiry, however, does not end here. Although there is no reason to suppose that any weakness in the linguistic boundary between the rational and the nonrational will result in excess reliance on religion by public officials, other factors bear consideration. The issue is the effect on the recipients of a message—a publicly stated norm of behavior—that it is permissible to rely on the religious with respect to nonrational determinations. The key categories within this message are those of the nonrational and the religious. The category of the nonrational turns out to be nonproblematic. In order to scrutinize the possible effects of telling public officials that, with respect to some determinations, they may rely on religious factors, however, the category of the religious still must be investigated.

The hypothesis here is that the category of the religious, or the category of justifiable reliance on religion, will be interpreted as being larger than it is because of something peculiar to religion. This "something" plainly encompasses many possibilities, but a few bear mentioning. One is the possibility that electoral forces in some areas are likely to weigh disproportionately in favor of *more* rather than less religious involvement. If the electorate does desire substantially greater religious involvement than is desirable as a matter of ideal theory, and if electoral approval is especially

important to the performance of some public officials, then there may be substantial pressures on public officials to interpret overly broadly rather than overly narrowly the realm within which they may properly take religion into account.

More importantly, the message that public officials may take religious convictions into account in exercising their official responsibilities will be a message that is relevant only to religious public officials, and those officials will be presented with two subdivisions of the world. One is the subdivision between the rational and the nonrational according to the public norm of official behavior. The other is the division between what is within the purview of religion and what is not, according to the religion to which the official subscribes. If the two subdivisions coincide, problems are unlikely; the realm of what is to be rendered unto Caesar and the realm of what is to be rendered unto God will be identical under both the norm of official behavior and the officials' own religious views. As a result, officials can follow their religious convictions to the limit while not violating the norm of official behavior. Similarly, no problems will occur if according to the particular religion the proper scope of religious involvement is *smaller* than that allowed by the norm of official behavior; again, officials can follow the dictates of their religion to the limit without violating the norm.

The problems arise with respect to those religions in which the proper scope of religious involvement in public life is *larger* than that permitted under the norm of official behavior. If, according to a particular religion, the area of religious determination includes some or all of what the norm would designate as "rational" and, therefore, not proper for religious involvement, then the norm will allow officials to take into account only *some* of what their religion would have them take into account. At this point, the question becomes one of determining whether a particular religion has, in effect, a "severability clause," making this kind of division possible, or whether the actual effect on the officials of saying that *some* religious considerations are relevant will be to say that *all* religious considerations are relevant.

I am discussing the extent to which a norm of official behavior that addresses only the instant case will lead, in practice, to the danger case, despite the fact that the norm purports to distinguish the two. In effect, the argument concerns the ability of a norm to

distinguish factors that might be assimilated in some other and larger world.[10] If that larger world would assimilate the instant case and the danger case, in terms of its political, social, linguistic, or cultural categories, then there are limits on the ability of a legal or other norm to cleave that assimilation, no matter how internally logical and justifiable the cleavage may be.

The question is not so much whether all of the larger world would assimilate the instant case and the danger case, but whether this assimilation exists in the minds, beliefs, and behavior of those officials who are the addressees of the norm. If that assimilation exists prior to announcement of the norm, then officials may have difficulty accepting the norm. If the prior assimilation comes from the religious beliefs of those to whom the norm is addressed, then the degree of resistance to what will be perceived as an artificial distinction will be even greater. Whether this is the case will vary from religion to religion; thus, examining the actual empirical likelihood of what I suggest here is not possible in these pages. If my guess is correct, however, then the nature of religious belief, and the hold that religious belief has on many people, is such that it may be particularly likely that the distinction between the instant case and the danger case will not be valid for them. If so, the risks of moving from the instant case to the danger case will be especially large, and this will constitute an argument for not taking the step to the instant case, however small that step may appear at first.

V.

In an important sense the analysis thus far has avoided the full reach of nonideal theory. We must deal with the fact that, regardless of what the norm of official behavior is, public officials *will* take their own religious convictions into account in performing their official duties. They may not always do so, but it is absurd to suppose that they have never done so with some frequency, that they do not now do so with some frequency, and that they will not always do so with some frequency.

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10. I discuss the relationship between legal assimilative categories and the assimilative categories of the larger world at greater length in Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

The question is thus one of determining how to confront the inevitable, in an area in which, to some or many, the inevitable might be assimilated with something perceived as quite dangerous. At this point two strategies present themselves. The first might be called the *strategy of accommodation.* Under this strategy one confronts the inevitable by allowing it, hoping in the process that what is allowed will satisfy the desires of those about whom one is concerned. This strategy runs the risk that the message of allowance will be taken as saying substantially more than it actually says, or allowing more than it actually allows. In exchange for this risk, however, this strategy maintains the authority or legitimacy of the norm structure at issue because, by allowing the inevitable, the inevitable need not violate the norm structure in order to exist.

Contrasted with the strategy of accommodation is the *strategy of resistance.* Under this strategy, fearful of the dangers attendant to expansion of the inevitable, one says "no" even to the inevitable. In doing so, one recognizes that this will involve some violation of the norm and thus some weakening in the authority of the norm structure as a whole, but this risk is accepted to minimize the likelihood of expansion beyond the inevitable. If the norm is perceived as unrealistic, however, it may break down entirely. People who perceive the fourth amendment as freeing murderers may lose all faith in that amendment, and people who see the free speech clause of the first amendment as protecting Nazis and Klansmen may refuse to accept the norm of freedom of speech. So too with religion. If people see freedom of religion, whether as political norm or constitutional directive, as prohibiting what is both desirable and inevitable, then freedom of religion may simply drop out of the public decisionmaking process. The strategy of resistance, however, is premised on the assumption that in some areas these dangers are less than the dangers accompanying official permission to engage in what is at least suspect. If official toleration of the suspect occurs, the fear is that this will be taken as implicit, if not explicit, permission to go one step further.[11]

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11. Consider from this perspective Korematsu v. United States, 323 U.S. 214 (1944). Although disturbing, perhaps reactions similar to those that prompted the internment of the Japanese-Americans never can be expected to disappear, and during time of war or national hysteria the courts will behave exactly the way they did in *Korematsu.* The mere fact that courts will fold under pressure, however, does not dictate that they should be *told* that they

Whether the fears grounding the strategy of resistance are greater than the fears grounding the strategy of accommodation will vary from problem area to problem area. One possible interpretation of Professor Greenawalt's "small step" is to say that he has adopted a strategy of accommodation to the inevitable. This may be the wisest course, but I have tried to suggest here that an alternative strategy may exist that must be explored. Resisting the inevitable is not to be desired because it will prevent the inevitable, but because it may be the best strategy for preventing what is less inevitable but more dangerous. If official reliance on religious conviction poses these dangers, the strategy of resistance ultimately may be the safest course.

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may fold under pressure, because the effect of the message may be to increase the likelihood of folding even when the pressure is less. Moreover, stating a norm that is unlikely to be followed still may have some effect, in the long run, on what is or is not inevitable. For an application of this latter perspective to the free speech clause, see Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).