

Center for Process Studies
Seminar Handout
MARK C. MODAK-TRURAN
 January 10, 2005

**REENCHANTING THE LAW:
 THE RELIGIOUS DIMENSION OF JUDICIAL DECISION MAKING**

- I. **ISSUE:** What, if any, is the role of religious beliefs in judicial decision making?
- II. **THESIS:** Judges should fully justify their decisions in hard cases by relying on their religious convictions in their deliberation (religionist deliberation) but that judges= religious convictions should only implicitly inform the legal explanation of their decision in their written opinions (separationist explanation). I refer to this as the religionist-separationist model of judicial decision making which maintains that religious convictions are the *silent prologue* to any full justification of the law.
- III. **FOUR MODELS OF THE RELATIONSHIP BETWEEN RELIGION AND JUDICIAL DECISION MAKING IN HARD CASES:**

	<u>Deliberation</u>	<u>Explanation</u>	<u>Model of Judicial Decision Making</u>
Religious Beliefs	no	no	separationist
Can or Should Be	yes	yes	religionist
Relied on in Judicial	no	yes	separationist-religionist
Decision Making	yes	no	religionist-separationist

IV. HARD CASES

My essential descriptive assumption about the nature of law in general is that the law is indeterminate such that there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue do not clearly resolve the dispute. Many theorists now refer to this broadly as legal indeterminacy. I will not attempt to establish the breadth or depth of this legal indeterminacy. Rather, my comments will focus on the hard cases of *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), where the Supreme Court addressed whether the concept of liberty of the Due Process Clause of the Fourteenth Amendment protects physician-assisted suicide and homosexual sodomy. Most legal theorists agree that these cases are hard cases. Hard cases raise a crucial question which has been largely ignored by contemporary legal theory: on what normative basis do judges determine which extra-legal norms are valid and which valid norm or norms are controlling in deciding hard cases? To address this issue, I will argue that a full justification of the extra-legal norms judges rely on in hard cases and the choice among them *requires* judges to rely on religious convictions.

V. DEFINING RELIGION

Regarding the definition of religion, I will adopt Schubert Ogden's definition of religion as "the primary form of culture in terms of which we human beings *explicitly* ask and answer the existential question of the meaning of ultimate reality for us." SCHUBERT M. OGDEN, *IS THERE ONLY ONE TRUE RELIGION OR ARE THERE MANY?* 5 (1992). According to this account, religion *explicitly* asks what is "authentic human existence" or "how are we to understand ourselves and others in relation to the whole." *Id.* at 6. The existential question, the question of meaning, is thus the question which is presupposed by all other questions. It is the comprehensive question concerning how humans should properly understand themselves and the comprehensive purpose for human existence. In other words, religion includes a comprehensive evaluation of all human activity to determine how human activity should contribute to the larger reality of which it is a part. Some people observe traditional religions like Christianity, Judaism, Islam, Hinduism, and Buddhism while others follow nontraditional religions like humanism, communism, and other so-called secular comprehensive perspectives. In either case, religious convictions provide answers to questions about when meaningful human life begins and ends and what sexual orientations are genuinely human. As a result, all human activity (including legal interpretation) is either implicitly or explicitly informed by a plurality of religious or comprehensive convictions.

VI. SUMMARY OF THE ARGUMENT

A. Fully Justifying Decisions in Hard Cases

Since all human activity implicitly or explicitly depends on a comprehensive conviction, judicial decision making is no exception. In easy cases, judges may apply the relevant legal norms without regard to the comprehensive convictions that implicitly justify those norms. In hard cases, however, judges must rely on extra-legal norms, such as political, historical, societal, and moral norms, because hard cases are, by definition, those cases in which the relevant legal norms do not provide a determinate outcome to the dispute in question. If the political, historical, societal, and moral norms in question are noncomprehensive extra-legal norms, they will not fully justify judges' decisions. A full justification of judges' decisions in hard cases requires judges to rely on a particular type of extra-legal norm - religious convictions about authentic human existence. Religious convictions are explicit comprehensive convictions which provide the comprehensive condition of validity for all normative thinking. Religious convictions should thus inform judicial deliberations in hard cases in several ways. First, any noncomprehensive extra-legal norm relied on must be justified by a religious conviction. Justifying extra-legal norms requires judges to determine that the norms in question would positively contribute to authentic human existence in the context of the case at issue. Second, the choice among extra-legal norms should also be justified by determining which norm or norms best contributes to authentic human existence. In addition, judges should rely on the religious

conviction that they have determined, based on critical reflection, to be true. Consequently, in deliberating about hard cases, judges should fully justify their decisions by relying on their religious convictions to justify all noncomprehensive extra-legal norms and the choice among them.

B. Caveat: The Role of Fully Justified Noncomprehensive Norms

My argument that a full justification of a judicial decisions in hard cases requires judges to rely on comprehensive or religious convictions, however, requires a *caveat* because this claim is not as demanding as it may initially seem. I am not arguing that in deliberating about every hard case, judges must specify a full justification of their decisions. My claim is more modest than this. What responsible judging requires is that judges have, at some point, fully justified all the extra-legal norms they rely on to decide hard cases. For example, in a hard case dealing with conflicting precedent, the judge must choose which line of precedent to follow. The law does not tell the judge which direction to go or which path to take. The judge must rely on extra-legal norms to determine which precedent to follow. If the extra-legal norms are noncomprehensive such as political, historical, social, or moral norms, then the judge will have to justify these noncomprehensive extra-legal norms in accordance with her comprehensive conviction. The judge can do this either *during*, *prior to*, or *alongside of* the process of deliberating about this hard case. In other words, even if the judge does not fully justify these noncomprehensive extra-legal norms *during* her deliberation about the case, she can rely on these norms if they have been fully justified *prior to or alongside of* her deliberation in that case.

C. Judges as Theologians?

Does this mean that judges must become theologians? Yes and no. On the one hand, all people should critically reflect on their religious convictions. The process of full justification requires critically reflecting on religious convictions in a manner similar to *Atheological@* reflection and that *Atheological@* reflection is an integral part of living authentically for all people. In this sense, judges, like all other self-reflective persons, are theologians. On the other hand, with respect to judicial decision making proper, the process of fully justifying noncomprehensive extra-legal norms does not have to proceed like theological inquiry. Theologians systematically develop a comprehensive account of the nature of ultimate reality and authentic human existence ahead of time and then proceed to determine answers to practical dilemmas. Unlike theologians, I am assuming that most judges fully justify noncomprehensive extra-legal norms in a piecemeal fashion. In the course of their lives *prior to and alongside of* judicial decision making, judges encounter practical dilemmas that require normative decisions. By appealing to their comprehensive conviction in these dilemmas, they may have already justified noncomprehensive norms that will aid in making legal decisions. If not, this presents an occasion for ascent to their comprehensive or religious convictions in order to determine what norms are justified for solving these dilemmas. They also receive assistance from

religious traditions in this process. In many hard cases, judges are drawing on noncomprehensive extra-legal norms that have already been fully justified in this ad hoc process. This allows judges focus on the particular facts of the case at hand and try to determine which previously justified noncomprehensive extra-legal norm is the most appropriate to resolve the dispute. Only in exceptionally hard cases, like *Washington vs. Glucksberg*, and *Lawrence v. Texas*, do judges encounter disputes that may put these previously justified norms into question.

VII. OBJECTIONS

A. Establishment Clause Objections

On the one hand, an objection to relying on religious convictions in judicial decision making based on the Establishment Clause of the First Amendment makes perfectly good sense. Judges should not cite passages from sacred texts or theologians to justify their decisions in their written opinions. If judges fully justify their decisions by relying on religious convictions in their opinions, their religious convictions would predominate over secular purposes because religious convictions, when properly understood, are the comprehensive condition of validity for all the judge=s convictions. In other words, the judges decision would lack a secular purpose. Even Justice Kennedy, who advocates substantial accommodation of religion by the state, has declared that A[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not . . . act in a way which >establishes a [state] religion or religious faith, or tends to do so.@ *Lee v. Weisman*, 505 U.S. 577, 587 (1992). On the other hand, the Supreme Court has rejected claims that the Establishment Clause is violated by Afederal or state regulation of conduct whose reason or effect merely happen to coincide or harmonize with the tenets of some or all religions@ and has emphasized that the fact that criminal prohibitions on murder, adultery, polygamy, and theft Aagree[] with the dictates of the Judaeo-Christian religions while [they] may disagree with others does not invalidate the regulation[s].@ *McGowan v. Maryland*, 366 U.S. 420, 442, 445 (1961). By implication, the Establishment Clause does not prohibit judges from relying on religious convictions for deciding cases as long as they set forth secular justifications in their written opinions.

B. Philosophical Objections

Given this understanding of the Establishment Clause, the common objection to relying on religious convictions in judicial decision making should be understood as a philosophical rather than a legal objection. With respect to this philosophical objection, I have argued at length elsewhere that the attempts of Jürgen Habermas, John Rawls, Kent Greenawalt, and Michael Perry to preserve the autonomy of the law have failed. Although I cannot go into those arguments here, my essential argument is that these separationist models of judicial decision making (Rawls and Habermas) and alternative versions of the religionist separationist model (Greenawalt and Perry) are incoherent because their

attempts to exclude or limit religious convictions in judicial decision making depend upon a religious or comprehensive conviction. My analysis of *Washington v. Glucksberg*, and *Lawrence v. Texas*, also practically demonstrate that judges, in their deliberations about hard cases, have to rely on comprehensive convictions about authentic human existence to provide a full justification of their decisions. As a result, as a philosophical objection, the claim that judicial decisions should be independent of religious convictions has much less force and is finally incoherent.

C. The Insincerity Objection

Even if the Establishment Clause issues could be overcome, some may object that it is insincere for judges to offer their written opinions as a justification for their decision without disclosing their religious justification. To address the Insincerity Objection, consider the converse approach of Chief Justice Roy Moore of the Alabama Supreme Court. In his concurring opinion in *Ex Parte H.H.*, 830 So.2d 21, 26 (Ala. 2002), he cited passages from *Genesis*, *Leviticus*, and St. Thomas Aquinas to justify a strong presumption of unfitness against homosexual parents for custody of their children. Countering Justice Moore's religious justification of this presumption would radically expand the interpretative issues involved in the litigation. First, the litigants must challenge his claim that the common law is based on natural law and revelation and that revelation is more reliable than natural law. This involves litigating the question of what is law, which is the central question of jurisprudence or the philosophy of law. It also raises the perennial debate in the philosophy of religion regarding the relationship between reason and revelation. Furthermore, the litigants must challenge his interpretation of *Genesis* and *Leviticus* which may require a substantial discussion of biblical hermeneutics. Lawyers could thus find themselves arguing issues of jurisprudence, philosophy of religion, biblical hermeneutics, and the proper role of judges in a pluralistic democratic society in addition to arguing about the facts and the law. Most lawyers and judges are quite ill-equipped to deal with these issues. Also, a battle of experts on these issues would not likely make the issues more manageable. The magnitude of these issues convincingly demonstrates the interminable practical problems that would arise from judges writing their religious convictions into the law. Leaving religious convictions out of judicial decisions is thus not insincere but wise. It avoids raising additional interpretative issues that would unnecessarily add substantial complexity to resolving legal disputes.

RELATED PUBLICATIONS:

Reenchanting the Law: The Proper Role of Religious Convictions in Judicial Decision Making, 53 Cath. U. L. Rev. 709 (2004).

Reenchanting International Law, 22 Miss. C. L. Rev. 263 (2003)(Symposium on Law, Religion, and Human Rights in Global Perspective).

Introduction to Symposium on Law, Religion, and Human Rights in Global Perspective, 22 Miss. C. L. Rev. 263 (2003).

Reenchanting the Law: The Proper Role of Religious Convictions in Judicial Decision Making (Ph.D. Dissertation, The University of Chicago, 2002)(submitted for publication).

The Religious Dimension of Judicial Decision Making and The Defacto Disestablishment, 81 MARQ. L. REV. 255 (1998)(Symposium on Religion and the Judicial Process).

A Pragmatic Justification of the Judicial Hunch, 35 U. Rich. L. Rev. 55 (2001).

Corrective Justice and the Revival of Judicial Virtue, 12 Yale J.L. & Human. 249 (2000).

Habermas=s Discourse Theory of Law and the Relationship Between Law and Religion, 26 Cap. U. L. Rev. 461 (1997).

Book Review, 84 J. Religion 136 (2004)(*reviewing* Lucinda Peach, *Legislating Morality: Pluralism and Religious Identity in Lawmaking* (2002)).

Book Review, Law & Politics Book Review, Vol. 13, No. 10 (October 2003) (<http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Bauman1003.htm>) (*reviewing* Richard W. Bauman, *Ideology and Community in the First Wave of Critical Legal Studies* (2002)).

Book Review, 82 J. Religion 313 (2002)(*reviewing* Eric Michael Mazur, *The Americanization of Religious Minorities*(1999)).

Book Review, 16 J. Law & Relig. 823 (2001)(*reviewing* FRANKLIN I. GAMWELL, *DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD* (2000)).

Book Review, 79 J. RELIGION 160 (1999) (*reviewing* MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* (1997)).