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LAW, ETHICS, AND RELIGION IN THE PUBLIC SQUARE: PRINCIPLES OF RESTRAINT AND WITHDRAWAL

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I. INTRODUCTION

In recent years, scholars have begun to recognize and discuss the profound questions that arise in attempting to determine the place of religion in the law and the legal profession. This discussion has emerged on at least two separate yet related levels.

On one level, scholars have debated the place of religion in various segments of the public sphere, including law and politics. As Professor Steven Smith has put it, this debate "centers on the claim that it is improper, or perhaps even unconstitutional, for government officials such as legislators and judges, ... to rely on their religious convictions in making political decisions."[1] According to Professor Smith, this debate began in 1988 and has since "become voluminous."[2]

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1. Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203, 203 (1998).

2. *Id.* at 203 n.1. Professor Smith credits Professor Kent Greenawalt with initiating this debate. *Id.* at 203. Similarly, other scholars have described "an explosion of thought about the role of religion in our law and politics." John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 306 (1998). This began with Greenawalt's 1986 Cooley Lectures at the University of Michigan Law School. *See id.* at 306 n.9.

Though by no means exhaustive, a list of some of the major works in this area might include STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGION (1993); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995) [hereinafter, GREENAWALT, PRIVATE CONSCIENCES]; KENT GREENAWALT, RELIGIOUS CONVICTIONS AND PUBLIC CHOICE (1988) [hereinafter, GREENAWALT, RELIGIOUS CONVICTIONS]; MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997) [hereinafter, PERRY, RELIGION IN POLITICS]; MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND

On a second and perhaps more personal level, lawyers have expressed the aim to place their professional values and obligations in the context of their overriding religious obligations.[3] Toward that goal, lawyers have started to examine the relationship between professional values and religious values. These efforts have resulted in what Professor Russell Pearce has called a "religious lawyering movement."[4]

The aim of this Essay is to consider briefly one of the issues that arises from viewing together these two levels of analysis. In particular, the Essay looks to explore, from both an ethical and jurisprudential perspective, the question of how an individual might balance an interest in identifying and articulating the proper role of religion in the public square against the individual's own religious beliefs and commitments. However, unlike the work of some scholars, the Essay does not start from the premise that a religious individual would or should feel obliged to advocate or decide issues of public concern based on religious principles. Instead, the Essay takes a step back and tries to examine some of the ethical and intellectual options open to the religious individual, who may or may not decide to employ religious arguments in public discourse. Elaborating on what Professor Kent Greenawalt has termed "principles of restraint" or "principles of withdrawal,"[5] the Essay focuses on three primary concerns that may lead a religious adherent to the conclusion that it is preferable to avoid reliance on religious doctrine

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MORALITY IN AMERICAN POLITICS (1991); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY (1988); *Symposium on Law and Morality*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1984); *Symposium: Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions*, 81 MARQ. L. REV. 177 (1998); *Symposium, The Role of Religion in Public Debate in a Liberal Society*, 30 SAN DIEGO L. REV. 849 (1993); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747 (1993).

3. While not all religions or religious obligations may always be described as overriding, this analysis focuses on hard cases in which an individual adheres to a religious system that, the individual believes, prescribes a specific normative approach to an issue. *Cf.* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 123 (describing a "typical modern religious view" as "comprehensive," and stating that "[a]s a comprehensive view, a religious perspective is not only broad in what it covers, its significance is overarching").

4. *See* Russell G. Pearce, *Symposium: Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998). There have been discussions of the history and development of the movement, as well as examples of different stages of the movement. *See id.*; *see also* Samuel J. Levine, *Introductory Note: Symposium on Lawyering and Personal Values—Responding to the Problems of Ethical Schizophrenia*, 38 CATH. LAW. 145 (1998); *Symposium: Faith and the Law, 27* TEX. TECH L. REV. 911 (1996); *Symposium: Lawyering and Personal Values*, 38 CATH. LAW. 145 (1998); *Symposium, Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 821 (1999); *Symposium: The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998).

5. *See* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 123-25.

in issues of public debate.

II. THREE REASONS FOR RESTRAINT

In 1988, I had the opportunity to participate in a symposium on the death penalty at St. Mary's University School of Law.[6] As a member of a panel that considered religious approaches, I discussed capital punishment in Jewish law, and its possible application to the American legal system. At several points in my presentation, I articulated my disagreement with an approach that determines how Jewish law would prescribe death sentences in the United States simply through an application of the historical frequency of the death penalty in Jewish legal history.[7] My view was premised on a recognition of the difficulties involved in trying to apply principles from a system that is both religious and legal in nature to the secular American legal system. At one point of my presentation, for example, I noted that Jewish law views capital punishment as contributing to the religious goals of repentance and atonement.[8] I posited that attempting to apply these religious principles in support of the implementation of the death penalty in the United States would be improper.[9]

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6. *See Symposium: Thoughts on Death Penalty Issues 25 Years After* Furman v. Georgia, 29 ST. MARY'S L.J. 929 (1998).

7. *See, e.g.*, Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037, 1040-41 (1998) (critiquing such an approach offered by both the prosecutor and an appellate judge in *Hayes v. Lockhart*, 852 F.2d 339 (8th Cir. 1988)).

8. *See id.* at 1042-43 & nn.19-24 (noting that although the Torah does prescribe the death penalty for some offenses, "[o]ne of the central functions of capital punishment in the Biblical justice system was to provide a means for the offender to atone for the capital offense.").

9. *See id.* at 1043 & nn.22-24.

> Although the processes of repentance and atonement are inherent parts of the Jewish legal system, that is clearly not the case in American penal law. Various rationales have been offered to support the use of the death penalty in the American criminal justice system, none of which justifies the death penalty on the grounds of repentance. Any such theory would likely be discredited as a violation of the Establishment Clause, or as a legally improper reliance on religious concepts that have no proper place in American legal thought.

Id. at 1043.

> The Talmudic death penalty is unfathomable apart from atonement and ritual. The American death penalty does not and cannot have, given the assumptions of our constitutional order, any focus on ritual and atonement. It would probably be reversible error for a jury even to consider that by condemning a defendant to death, they might be guaranteeing to him "a portion in the world to come."

Following my presentation, a professor identifying herself as a Catholic who, pursuant to her religious beliefs, advocated the abolition of capital punishment in the United States approached me. She expressed both puzzlement at and disappointment in my reluctance to adopt a normative approach to capital punishment in the United States based on the treatment of the death penalty in the Jewish legal system. In this section, responding in part to her questions, I attempt to map out more broadly some of the reasons a religious adherent might choose not to rely directly on doctrinal religious principles in analyzing contemporary legal issues in the United States.

A. Normative Concerns

My initial response to the questioner at the symposium, and the one I probably find most compelling, is that, on a normative level, I found it unsettling to suggest that the United States should adopt laws based primarily on direct reliance on a set of religious beliefs. In the case of the death penalty, for example, it seems not only difficult but rather disturbing to picture a judge[10] in the United States, deciding whether to implement the death penalty based on that judge's view that Jewish law either favors or opposes capital punishment.[11] My primary concern with this scenario is that such a decision would grant religion a measure of normative authority inconsistent with and not recognized by the American legal system.[12]

Bruce S. Ledewitz & Scott Staples, *Reflections on the Talmudic and American Death Penalty*, 6 U. FLA. J.L. & PUB. POL'Y 33, 37 (1993).

For an illuminating theoretical attempt to apply the concept of atonement to American law, see Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999).

10. The focus on judicial decision making in this section may be particularly helpful, as the section deals with normative concerns, which figure most prominently and significantly in the actions of judges.

11. The actual approach of Jewish law to capital punishment is complex. For discussions of some of the complexities involved and some of the common misconceptions regarding this approach, see Levine, *supra* note 7, at 1038-39 n.4-6 *passim* (citing sources); Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 509 n.12 *passim* (1998) (citing sources).

12. *Cf.* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 124. Professor Greenwalt suggests that a religious adherent:

> might accept the principle of withdrawal... as an actual requirement of justice, given pluralist conditions. She might suppose that it is inappropriate for the state to support a religion accepted by only one-sixth of the population, even when that sixth happens to be right in its religious view. Such support would inadequately respect freedom and consent as grounds of human community.

A number of scholars have similarly expressed their disapproval of judicial decisions that find primary justification in principles of religious truth. According to Professor Greenawalt, for one, "[t]he government of a liberal society knows no religious truth and a crucial premise about a liberal society is that citizens of extremely diverse religious views can build principles of political order and social justice that do not depend on particular religious beliefs."[13] Likewise, Professor Michael Perry has found that "legislators and other public officials, including judges, should not rely on a religious premise in making a choice unless, in their view, a persuasive secular premise supports the choice."[14]

In addition, as Professor Scott Idleman has documented, "there may be instances where a judge should be vulnerable to professional discipline for [the] use (or misuse) of religion . . . where such use jeopardizes the apparent impartiality of [the] office or manifests a thorough disregard for the rule of law."[15] Finally, again as a normative matter, primary

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Id. at 124.

See also Ledewitz & Staples, *supra* note 9, at 37-38 ("Simply incorporating Talmudic practice in the American legal system would not be coherent or possible. Nor would it make sense to grant normative supremacy to the Talmud per se. The two systems are different; the two societies are different."); Randy Lee, *A Look at God, Feminism, and Tort Law*, 75 MARQ. L. REV. 369, 386 (1992) ("[T]here is something artificial in trying to inject Christian values into the [American] legal system.").

13. GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2, at 216-17.

14. PERRY, RELIGION IN POLITICS, *supra* note 2, at 157 n.150. *Cf.* Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1077 (1986).

> Perhaps implicit in the idea of a liberal democracy . . . is an obligation [on] 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.

Id.; see also Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 492 (1996) ("[G]overnment may not make decisions that are themselves based on contested religious beliefs that cannot be rationally supported, that privilege religious over secular beliefs, or that single out religious beliefs from among other nonrational beliefs for preferential treatment."); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safer for Religious Minorities*, 47 DEPAUL L. REV. 499, 501 (1998) ("I doubt I will be giving too much away by first suggesting that religious reasons should not be deemed legitimate justifications for public policy. All laws should be justified by secular reasons accessible to all citizens, whether religious or not."); *but see* Smith, *supra* note 1, at 217 (citing the argument that "if judges may properly consult views of morality or philosophy outside the text, then there is no good reason to restrict them from considering religious perspectives").

15. Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81

reliance on religious grounds for a judicial ruling may prove an unconstitutional violation of the Establishment Clause.[16] According to Professor Perry, "[t]he nonestablishment norm forbids—properly forbids, in my view–government, including the judicial branch, to rely on a religious premise in making a choice if no plausible secular premise supports the choice."[17]

As a descriptive matter, this view of judicial decision making appears to depict fairly accurately the extent to which judges rely on religious beliefs to arrive at decisions. To be sure, there are numerous examples of judicial opinions that cite religious principles in support of a ruling.[18] Nevertheless, as Professor Greenawalt has noted, it is "highly unusual" to find "direct reliance on a religious source to establish a moral proposition of legal relevance."[19] Instead, Greenawalt observes, "[a] judge may refer to Christian tenets to help put a legal problem or doctrine, or social attitudes, in a historical perspective."[20] A judge, however, "is not likely to say that an otherwise debatable legal conclusion is correct because it conforms to Christianity or some other supposedly true religious understanding."[21]

MARQ. L. REV. 537, 564 (1998). Likewise, as noted by scholars who have studied the conduct of Catholic judges in capital cases, if a judge feels religiously prohibited from implementing the death penalty, "[t]he legal system has a solution for this dilemma—it allows (indeed it requires) the recusal of judges whose convictions keep them from doing their job." The authors conclude that "[t]his is a good solution." *See* Garvey & Coney, *supra* note 2, at 303.

16. *See* Idleman, *supra* note 15, at 553-55; GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 66.

17. *See* PERRY, RELIGION IN POLITICS, *supra* note 2, at 103 (emphasis in original).

18. *See* Scott C. Idleman, *Note, The Role of Religious Values in Judicial Decision Making*, 68 Ind. L.J. 433 (1993).

19. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 207 n.2.

20. *Id.* at 142.

21. *Id.* As Greenawalt further explains,

> most judges . . . assume that basic differences among religious views are not resolvable on the basis of shared forms of reasoning. Thus, no particular religious view is seen to be imbedded in the legal materials themselves or to be a part of some common understanding or technique of reason that stretches beyond the legal materials but can be a source of guidance.

Id.; *cf.* United States v. Lynch, No. 96-6137, 1996 WL 717912, at **2 (2d Cir. Dec. 11, 1996) (rejecting argument based on natural law that it should nullify statute for "violat[ing] principles superior to the Constitution" and finding that "[u]nder Supreme Court precedent, well-settled constitutional principles, and the rule of stare decisis, we decline to invalidate a federal statute . . . on the basis of natural law principles.").

Notably, at times even religious adherents who declare an intention to argue a legal position based on religious grounds do not, in fact, rely primarily on arguments requiring accep-

B. Practical Concerns

Even if a court did indeed deem it proper, as a normative matter, to decide a legal issue through reliance on a religious understanding, such an attempt would presumably face too many obstacles to prove practical. These obstacles offer an additional reason that a religious individual may not expect or even desire that a court adopt a particular legal stance based on the substantive legal position of the adherent's religion.

As noted above, reliance on a religious position to decide a legal question would apparently involve granting the religious position a measure of legal authority. If such authority is an acknowledgment of the status of religion as an expression of divine truth, the decision maker who relies on religion would be required to choose between numerous religious systems to arrive at a particular version of that truth. This difficulty is not limited merely to selecting a particular religious system, such as "Judaism," "Christianity," or even "Catholicism." Many religions have complex approaches to difficult questions.[22]

A look at the approach of Jewish law to capital punishment is again instructive. Contrary to common misconceptions evidenced by the statements of prosecutors, judges, and others, this approach cannot properly be portrayed through the generalization that Jewish law either

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tance of the legal authority of their religious principles. Instead, while religion may be consistent with, or even motivate, their political positions, their arguments are sometimes based primarily in concepts more accessible and thus often more acceptable to nonadherents.

For example, when I participated in a panel on religious approaches to capital punishment, the other two speakers were lawyers who had publicly and repeatedly identified themselves as Catholics who opposed the death penalty on religious grounds. However, while it was clear from their presentations that their religious views informed their political positions as well as their arguments, it also seemed that the force of their arguments revolved primarily around concerns of morality not necessarily dependent on their substantive religious convictions. *See* Kevin M. Doyle, *A Catholic Lawyer's View of the Death Penalty*, 29 ST. MARY'S L.J. 949 (1998); Robert F. Drinan, S.J., *Will Religious Teachings and International Law End Capital Punishment?*, 29 ST. MARY'S L.J. 957 (1998).

22. In addition, there often exist intradenomenational disputes over controversial issues. Thus, reliance on a religious point of view may involve not only selecting a particular religious system, but also deciding between different interpretations of that system–a decision that courts have traditionally eschewed on constitutional and other grounds.

For discussions and critiques of the courts' approach, see Kent Greenawalt, *Judicial Resolution of Issues About Religious Conviction*, 81 MARQ. L. REV. 461 (1998); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843 (1998); Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469 (1998); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997); Winfred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441 (1998).

favors or opposes capital punishment.[23] Nevertheless, it is not uncommon for prosecutors to invoke biblical verses simplistically and mechanically to support arguments in favor of the death penalty.[24] A less common error relies on certain Talmudic sources to conclude that Jewish law is almost absolutely opposed to the death penalty.[25] Both of these positions fail to appreciate fully the complex legal and philosophical attitudes that contribute to the laws of capital punishment in the Jewish legal system. Indeed, any attempt at an accurate application of Jewish law to the American law of capital punishment would require a sophisticated understanding of Jewish law. Such an attempt would require an analysis more nuanced than a direct reliance on substantive religious law to decide a question of American law. Instead, it would require a consideration of the conceptual foundations underlying the approach of capital punishment in Jewish law, with the aim of identifying and applying those that are suitable to the American legal debate.[26]

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23. *See supra* note 11. Similarly, scholars have written that:

> Catholic teaching about capital punishment is fairly complicated .... In modern Catholic teaching, capital punishment is often condemned along with other practices whose point is the taking of life—abortion, euthanasia, nuclear war, and murder itself .... But a more precise statement of the church's teaching requires a few qualifications. The prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not.

Garvey and Coney, *supra* note 2, at 306-07.

24. *See, e.g.*, Levine, *supra* note 7, at 1040; Rosenberg & Rosenberg, *supra* note 11, at 508-09 n.11; Daniel A. Rudolph, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437 (1996).

25. *See* Levine, *supra* 7, at 1040-41.

26. Therefore, my presentation at the symposium "focuse[d] on the conceptual underpinnings behind pertinent Jewish law, considering the potential relevance and effect of those conceptualizations on American legal thought." *Id.* at 1039. Indeed, as I have suggested elsewhere, "[certain] conceptual similarities between American law and Jewish law allow for meaningful yet cautious comparison of the two systems." *See* Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 444 (1997).

Such an approach precludes only the assumption that religious thought should be granted inherent legal authority in the American legal system. It does not prevent consideration of the logic and value of religious positions when they are helpful in American legal analysis. Therefore, according to this approach, a proposal such as that of Professor Steven Smith, who suggested an alternative to the traditional rule of damages through a system based largely in religious thought, would be considered on the basis of the merits of its logic and efficacy. *See* Smith, *supra* note 1, at 221-27. *See also* Lee, *supra* note 12, at 386-407.

C. Tactical Concerns

Finally, aside from other concerns, a religious adherent may prefer to avoid reliance on religious arguments in public discourse for largely tactical reasons.[27] Marc Stern, who identifies himself as an Orthodox Jew, has thoughtfully described some of the difficult ethical questions he confronts in reconciling his religious principles with his work as a public interest lawyer.[28] According to Stern, "often the hardest question, even if one concludes that religious dictates require a particular position, [is] whether it is appropriate to ask the government to undertake to mandate (or forbid) that practice."[29] Stern refines the question as "whether it is wise to do so; whether it is in the interest of any particular faith to take advantage of a minority political constellation to further its position."[30] He recommends a consideration of how "such an action [would] affect the general tolerance of society."[31] For example, Stern suggests, "[a] faith might gain the religious benefit of stopping abortion . . . but only at tremendous cost to the social fabric, and to the live-and-let-live atmosphere which has allowed religion to flourish."[32]

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27. This part of the discussion assumes that the religious adherent is in the position, described by Greenawalt, in which "one's religious convictions call for certain practices" and "one thinks the practices should be instituted." GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 123. In a different scenario, "one's religious views may not speak directly about political organization and justice. One may think the main techniques for deciding these issues need not rely on religious premises themselves and are compatible with a wide variety of religious premises . . . . " *Id.* at 124. *But see* Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 20 (1984). Cuomo states that:

> the Catholic Church's actions with respect to the interplay of religious values and public policy make clear that there is no inflexible moral principle which determines what our political conduct should be. For example, on divorce and birth control, without changing its moral teachings, the Church abides [by] the civil law as it now stands, thereby accepting, without making much of a point of it, that in our pluralistic society we are not required to insist that all our religious values be the law of the land.

Id.; *see also* Garvey & Coney, *supra* note 2, at 306 (stating that "it is not possible to say, as some might suppose, that members of the Catholic Church are simply bound by their faith to follow the Church's teaching on" capital punishment).

28. *See* Marc D. Stern, *The Attorney as Advocate and Adherent: Conflicting Obligations of Zealousness*, 27 TEX. TECH L. REV. 1363 (1996).

29. *Id.* at 1372.

30. *Id.*

31. *Id.*

32. *Id.* Advocates of such a position might draw an analogy to the importance of various constitutional protections that, at times, require undesirable results such as freeing of some-

While Stern's depiction of the dangers to religion and society that might result from a ban on abortion may seem exaggerated to some, he offers sound advice to religious adherents and in particular to religious minorities. As Mario Cuomo has eloquently put it:

> [T]o assure our freedom we must allow others the same freedom, even if occasionally it produces conduct by them which we would hold to be sinful.
>
> I protect my right to be a Catholic by preserving your right to believe as a Jew, a Protestant or non-believer, or as anything else you choose. We know the price of seeking to force our beliefs on others is that they might some day force theirs on us. This freedom is the fundamental strength of our unique experiment in government. In the complex interplay of forces and considerations that go into the making of our laws and policies, its preservation must be a pervasive and dominant concern.[33]

As both Stern and Cuomo clearly recognize, a successful campaign by religious adherents for governmental endorsement of one religious position might prove a Pyrrhic victory if it likewise allows the government to choose other positions antithetical to the religious views of those adherents.[34]

III. CONCLUSION

In analyzing the proper place of religion in law and politics, it is important to acknowledge that religious adherents may not always seek to invoke religious principles in matters of public debate. Likewise, it is important to recognize that an adherent's decision not to rely on religious principles does not necessarily indicate that the adherent is any less committed to those principles than are others who refer to religion in

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one who actually committed a crime, but, more significantly, serve as indispensable guarantors of freedom for all members of society.

33. Cuomo, *supra* note 27, at 16

34. Professor Greenawalt describes a related but slightly different scenario in which a religious adherent

> would think it preferable for the government to support the true religion, which is accepted by only one-sixth of the people; however, realizing that she and her cobelievers do not have the political clout to achieve this result, [she] is willing to settle for the government keeping its hands off religion.

See GREENAWALT, PRIVATE CONSCIENCES, *supra* note 2, at 124.

advocating or selecting a legal position. There are a number of reasons a religious individual might prefer to avoid employing references to religious principles in the public square, out of respect for both the law and religion itself.

At the same time, Marc Stern offers valuable advice for the individual lawyer, for whom "the policy of tolerance has real personal costs." Stern cautions that

> [t]olerance on large public issues too readily becomes moral indifference. It is hard, and may be disingenuous, to insist that while I am opposed to abortion, and regard it (at least in many cases) as an unspeakable moral wrong, I am prepared to tolerate abortion in the name of other goods. This involves a weighing of competing harms, in which it is often too easy to downgrade the particular religious norm in favor of tolerance . . . .[35]

Such ethical and intellectual honesty appears to be essential in facing the difficult questions confronting the religious individual attempting to determine the proper role of religious beliefs in the public square.

35. *See* Stern, *supra* note 28, at 1373; *cf.* Cuomo, *supra* note 27, at 22, 23 (endorsing "a measured attempt to balance moral truths against political realities," but insisting that "we should not be forced to mold Catholic morality to conform to disagreement by non-Catholics, however sincere or severe their disagreement").