

# JUDGING RELIGION AND JUDGES' RELIGIONS

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## ABSTRACT

In liberal democracies with religiously diverse populations, it would be surprising and troubling if a judge relied on a religious text or precept to resolve a legal dispute. It would deeply offend principles of religious freedom if individuals were bound by judicial pronouncement to obey the dictates of a faith they do not share. However, some commentators have long claimed that a person's cultural worldview has an impact on the way they interpret laws and facts, and there is some empirical support for this claim. There is thus reason to expect that judges' worldviews have some effect on their decision-making. I argue that when judges deliberately avoid engaging with their own moral perspectives, they may mask to themselves the impact that such perspectives have on their decisions. The alternative of explicit reference to religious sources in judicial decisions, however, is too problematic for the religious freedom of legal subjects. I argue that judges should instead endeavor to be conscious of the influence their backgrounds have on their decision-making, but suggest that judicial institutions may be resistant to adopting practices that would support such an approach. The article draws on Canadian and American case law to demonstrate its argument but has wider applicability to liberal states.

**KEYWORDS:** judicial decision-making, religious freedom, judicial psychology, religious diversity, public reason

## INTRODUCTION

In liberal democracies with religiously diverse populations, it would be surprising and troubling if a judge relied on a religious text or precept to resolve a legal dispute. It would deeply offend principles of religious freedom if individuals were bound by judicial pronouncement to obey the dictates of a faith they do not share. And yet, as some have theorized<sup>1</sup> and current social science accounts support, judges are likely to draw, consciously or not, on their own moral backgrounds in reaching some decisions. In other words, though a population's religious diversity can be a reason for constitutionalized protections of religious freedom, religious diversity also increases the risk that the resolution of a litigant's case is affected by religious views they do not share.

I explore three models of decision-making that might be pursued in response to this conundrum: (1) the public reason model, which encourages judges not to rely on any comprehensive perspective in reaching their decisions; (2) the model of expressive overdetermination, which favors candor about moral commitments; and (3) the model of judicial self-consciousness, which encourages

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<sup>1</sup> See, for example, Nicholas Wolterstorff, "The Role of Religion in Decision and Discussion of Political Issues," in *Religion in the Public Square*, ed. Robert Audi and Nicholas Wolterstorff (Lanham: Rowman and Littlefield, 1997), 117.

judges to reflect on how their backgrounds inform their decisions, but draft decisions that can be supported on the basis of multiple comprehensive perspectives. Based primarily on concerns about the religious freedom of legal subjects, I argue in favor of the third, but explain why the judicial context is resistant to institutionalizing practices that might enhance self-conscious judgment.

### THE LEGITIMATE EXERCISE OF JUDICIAL POWER

It is axiomatic that liberal states are committed to maintaining citizens' ability to choose for themselves a vision of the good life.<sup>2</sup> Given the centrality of this understanding of freedom in liberal thought, and given also that religions tend to adopt particular views about the meaning of the good life, it is hardly surprising that liberal theorists and states view religious neutrality as a noble ideal for judges.<sup>3</sup> If a judge were to justify their reasons on the basis of a particular religion, they might fairly be seen as imposing the tenets of their religion on litigants, and compromising those litigants' ability to choose for themselves a comprehensive view of the good.<sup>4</sup>

Accordingly, as John Rawls's well-known argument goes, judges should rely only on public reason, which "neither criticizes nor attacks any comprehensive doctrine, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity."<sup>5</sup> The commitment to judicial neutrality is thus explained by a desire to ensure the legitimacy, in principle and appearance, of judicial decisions.<sup>6</sup> There are, however, reasons to doubt the attainability of such an ideal. As Charles Taylor has argued, true neutrality is a practical impossibility. In "The Politics of Recognition," Taylor writes that the only standards Westerners have to evaluate other cultures "are

2 "The defining feature of liberalism is that it ascribes certain fundamental freedoms to each individual . . . . It allows people to choose a conception of the good life, and then allows them to reconsider that decision, and adopt a new and hopefully better plan of life." Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995), 80; similarly, Benjamin Berger writes that, according to the basic tenets of liberalism, "[t]he role of the public . . . is simply to create a set of procedural conditions that will guarantee sufficient autonomy and to remain agnostic as to the good." "Law's Religion: Rendering Culture," *Osgoode Hall Law Journal* 45, no. 2 (2007): 277–314, at 301.

3 There are, of course, historical explanations for this view in addition to the normative explanations discussed here, including, perhaps most notably, England's experiences in the Wars of Religion. See Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation* (Québec: Gouvernement du Québec, 2008), 136. These explanations are beyond the scope of this article.

4 See Sarah E. Hamill, "Judges and Religious-Based Reasoning: A Response to Ginn and Blaikie," *Constitutional Forum* 21, no. 1 (2012): 15–25. Some argue that judges should be allowed to rely on religious-based reasons where law is underdetermined. Diana Ginn and David Blaikie, "Judges and Religious-Based Reasoning," *Constitutional Forum* 19, no. 2 (2011): 53–64, at 53; see also *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 351 (Canada) ("In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the Charter, it is no longer legitimate.").

5 John Rawls, "The Idea of Public Reason Revisited," in *The Law of Peoples*, ed. John Rawls (Cambridge, MA: Harvard University Press, 1999), 129–80, at 132.

6 Some empirical research supports the claim that beliefs in the US Supreme Court's legitimacy are based on perceptions of the judiciary's neutrality (understood more generally). Moreover, "neutrality effects are primarily related to judgments about honesty and about whether information (not personal opinion) is used to make decisions." Tom R. Tyler and Gregory Mitchell, "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights," *Duke Law Journal* 43, no. 4 (1994): 703–815, at 775–76.

those of North Atlantic civilization.”<sup>7</sup> Others have expressed this idea as the “inevitability of subjectivity,”<sup>8</sup> and the Supreme Court of Canada has concurred that “from a philosophical standpoint, absolute neutrality does not exist.”<sup>9</sup>

With specific respect to judges, Martha Minow has similarly argued that judges “inevitably [see and judge] from a particular situated perspective.”<sup>10</sup> In the evocative words of Justice Cardozo from nearly a century ago, though judges “may try to see things as objectively as we please . . . we can never see them with any eyes except our own.”<sup>11</sup> A recent unanimous decision of the Supreme Court of Canada candidly affirms this view, noting that judges “will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences.”<sup>12</sup>

Mark Modak-Truran takes this position further. He argues that, given a legally indeterminate environment and a sufficiently broad definition of religion (similar to Rawls’s “comprehensive doctrines”),<sup>13</sup> religious convictions are in fact central to judicial decision-making:

Legal indeterminacy is widely recognized. . . . Contrary to the current consensus, religious convictions are central to understanding judicial decision making under these conditions . . . . Some people observe traditional religions like Christianity, Judaism, Islam, Hinduism, and Buddhism while others follow non-traditional 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, a full justification of

7 Charles Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 23–48, at 45.

8 I owe this formulation to Jennifer Nedelsky.

9 *S. L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235.

10 Minow goes on to argue that “[t]he impact of the observer’s unacknowledged perspective may be crudely oppressive. When a municipality includes a nativity crèche in its annual Christmas display, the majority of the community may perceive no offense to non-Christians in the community. If the practice is challenged in court as a violation of the Constitution’s ban against the establishment of religion, a judge who is Christian may also fail to see the offense to anyone and merely conclude, as the Supreme Court did in 1984, that Christmas is a national holiday.” *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990), 50–52, 62; see *Lynch v. Donnelley*, 465 U.S. 668 (1984); see also Margaret Davies, “Pluralism in Law and Religion,” in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoë Robinson (Cambridge: Cambridge University Press, 2008), 72–99, at 93 (“It is actual people who make legal meanings: they are situated in linguistic and social communities and bring their worlds into their interpretations.”)

11 Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 13, as cited in Masua Sagiv, “Cultural Bias in Judicial Decision Making,” *Boston College Journal of Law and Social Justice* 35, no. 2 (2015): 229–56, at 232.

12 *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282, para. 32 (Canada); the cited passage comes originally from a plurality decision in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, paras. 38–39 (Canada). Louis E. Newman conducted an interview-based study of four trial judges specifically investigating the influence of religion on their judgment. He concludes: “For these judges, it seemed on the whole that their religious commitments did not so much influence the specific decisions they made as provide a foundation (or an ongoing stimulus) for their moral development. On one end of that spectrum, religion can be a pervasive influence on the moral life of a judge, transforming the entire enterprise of judging into a religious activity. For others it serves in a more limited way—as a source of specific values, of the conviction that life is ultimately meaningful and demands moral commitment, and/or of personal, familial experiences.” “Beneath the Robe: The Role of Personal Values in Judicial Ethics,” *Journal of Law and Religion* 12, no. 2 (1995): 507–32, 526.

13 Mark C. Modak-Truran, “Reenchanting the Law: The Religious Dimension of Judicial Decision Making,” *Catholic University Law Review* 53, no. 3 (2004): 709–816; see also Schubert M. Ogden, *Is There Only One True Religion or Are There Many?* (Dallas: Southern Methodist University Press, 1992).

the extra-legal norms judges rely on in hard cases and the choice among them *requires* judges to rely on religious convictions.<sup>14</sup>

Similarly, Stephen Carter writes that “it is quite evident that the judge cannot make . . . decisions without relying, at least in part, on her moral knowledge.”<sup>15</sup> Sanford Levinson reminds us that a good deal of judges’ work involves *doing justice*, and that arriving at a right result may require a preliminary vision of the good.<sup>16</sup>

As an example of this claim, Kathryn Lee argues that US federal Judge John T. Noonan’s decisions in the realm of immigration were significantly influenced by his Catholic background.<sup>17</sup> Though appointed by Ronald Reagan’s Republican administration and presumed to be politically conservative, Lee suggests that the concept of exile within biblical narratives made Justice Noonan more sensitive to the personal plights of refugee claimants and allowed him to hear their stories with deeper sympathy than other judges.<sup>18</sup>

Empirical studies support the view that religion and judicial decision-making are in some sense interconnected, though these focus principally on outcomes, not reasoning.<sup>19</sup> In Canada, Donald Songer’s quantitative analysis of more than thirty years’ worth of cases at the Supreme Court of Canada found a statistically significant influence of religion on judicial voting, though the impact of religion seems to have waned in the post–Charter of Rights and Freedoms era.<sup>20</sup> In the United States, Songer and Susan Tabrizi reviewed approximately 3,900 cases in state supreme courts from 1970 to 1993, and found that “Evangelical justices were found to be significantly more conservative than mainline Protestant, Catholic, and Jewish justices in death penalty, gender discrimination, and obscenity cases.”<sup>21</sup> In Songer and Tabrizi’s view, “[t]hese findings suggest that religious

14 Modak-Truran, “Reenchanting the Law,” 713–14 (emphasis in original). For an example of a case where some basic view about when human life begins was required to dispose of a dispute between a divorcing couple regarding the fate of their previously frozen preembryos, see *Davis v. Davis*, 842 SW 2d 588 (Supreme Court 1992). For a similar controversy regarding the fate of frozen embryos of a deceased couple, the answer to which was informed by a report commissioned by the Australian state of Victoria from a committee of “legal experts, philosophers, theologians and scientists,” see “Panel in Australia Urges That Orphaned Frozen Embryoes Be Destroyed,” *New York Times*, September 4, 1984, <http://www.nytimes.com/1984/09/04/science/panel-in-australia-urges-that-orphaned-frozen-embryoes-be-destroyed.html>; see also Keith Dalton, “Dead Couple’s Embryos to Be Thawed,” *Washington Post*, December 4, 1987, <https://www.washingtonpost.com/archive/politics/1987/12/04/dead-couples-embryos-to-be-thawed/53c4c4cb-ab70-4f2b-86b1-coff72879da9/>.

15 Stephen L. Carter, “The Religiously Devout Judge,” *Notre Dame Law Review* 64, no. 5 (1989): 932–44, at 935. Judges themselves may at times make similar assertions. Former US Supreme Court Justice Benjamin Cardozo wrote that judges “cannot escape that current [of having an underlying philosophy of life which gives coherence and direction to thought and action] any more than other mortals.” *The Nature of the Judicial Process*, cited in Kathryn A. Lee, “The Religious Imagination, Empathy, and Hearing the Other: Judge John T. Noonan, Jr. and Immigration,” *University of Detroit Mercy Law Review* 83, no. 5 (2006): 923–46, at 929.

16 Sanford Levinson, “The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices,” *DePaul Law Review* 39, no. 4 (1989): 1047–82, at 1080.

17 Lee, “Religious Imagination, Empathy, and Hearing the Other,” 927. Lee acknowledges that searching for causal links between a judge’s religious beliefs and his or her decisions may be seen as a “fool’s errand . . . because the search will never uncover a linear causality providing the security of exhaustive explanation.”

18 Lee, 925.

19 See Stephen M. Feldman, “Empiricism, Religion, and Judicial Decision-Making,” *William and Mary Bill of Rights Journal* 15, no. 1 (2006): 43–58.

20 Donald R. Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008), 198–209.

21 Donald R. Songer and Susan J. Tabrizi, “The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts,” *Journal of Politics* 61, no. 2 (1999): 507–26, at 507.

affiliation is an indicator of a source of judicial values that is independent of partisan sources of values that have been discovered in previous research.”<sup>22</sup>

Gregory Sisk, Michael Heise, and Andrew P. Morriss approached this question from a different direction. Analyzing all published US Federal District and Appeals court decisions involving religious freedom issues over a ten-year period (1986–1995), they found that “the single most prominent, salient, and consistent influence on judicial decisionmaking was *religion*—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.”<sup>23</sup>

Sisk and Heise later analyzed a different data set of 238 cases from US Federal Courts raising Establishment Clause issues for the period 1996–2005.<sup>24</sup> Challenging, to some extent, Songer and Tabrizi’s claim about the independence of religion and partisanship, they concluded that, “[i]n the context of federal court claims implicating questions of Church and State, it appears to be ideology much, if not all, of the way down.” Their key finding is that

an Establishment Clause claimant’s chances for success were 2.25 times higher before a judge appointed by a Democratic president than one appointed by a Republican president. . . . No other variable—not the judges’ prior legal positions, religion, race, or gender—proved consistently salient in predicting the outcome of claims alleging that governmental conduct crossed the supposed line “separating Church and State” under the Establishment Clause.<sup>25</sup>

Sisk and Heise note that their findings could be

celebrated as a proper integration of political and moral reasoning into constitutional judging, shrugged off as mere realism about judges being motivated to promote their political attitudes, or deprecated as a troubling departure from the aspirational ideal of neutral and impartial judging.<sup>26</sup>

Their own view is tempered by the consideration that the prevailing majority opinions on the Establishment Clause from the US Supreme Court are vague and admit of multiple interpretations.<sup>27</sup> Accordingly, “the Supreme Court’s Establishment Clause jurisprudence invites even the most conscientious of judges to draw deeply on personal reactions to religious symbols and political attitudes about religious influence on public institutions or policies.”<sup>28</sup> Sisk and Heise’s results

22 Songer and Tabrizi, 507.

23 Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, “Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions,” *Ohio State Law Journal* 65, no. 3 (2004): 491–614, at 614.

24 Gregory C. Sisk and Michael Heise, “Ideology ‘All the Way Down?’ An Empirical Study of Establishment Clause Decisions in the Federal Courts,” *Michigan Law Review* 110, no. 7 (2012): 1201–64; see also their similar results in Michael Heise and Gregory C. Sisk, “Religion, Schools, and Judicial Decision Making: An Empirical Perspective,” *University of Chicago Law Review* 79, no. 1 (2012): 185–212.

25 Sisk and Heise, “Ideology ‘All the Way Down?’,” 1204–5.

26 Sisk and Heise, 1204.

27 See Gregory C. Sisk and Michael Heise, “Judges and Ideology: Public and Academic Debates about Statistical Measures,” *Northwestern University Law Review* 99, no. 2 (2005): 743–804, at 746 (“The growing body of empirical research on the lower federal courts, including the study of religious liberty decisions reported in this Article, reveals that ideology explains only a relatively modest part of judicial behavior and emerges on the margins in controversial and ideologically contested cases.”)

28 Sisk and Heise, “Ideology ‘All the Way Down?’,” 1263; but see James C. Brent, “An Agent and Two Principals: U.S. Court of Appeals Responses to *Employment Division, Department of Human Resources v. Smith* and the Religious Freedom Restoration Act,” *American Politics Research* 27, no. 2 (1999): 236–66, at 236, who finds empirical support for the claim that the US Court of Appeals “became more hostile to religious free exercise claims

show, at least, that judges' previously held normative beliefs, what Richard Posner would call their "priors,"<sup>29</sup> have a noticeable effect on judgments having to do with religion.<sup>30</sup> A more recent study offers some additional support, finding that Jewish judges had a higher propensity to be concerned about the separation of religion and state than their fellow judges.<sup>31</sup>

A modest reading of the above empirical research supports the claim that religious affiliation and preexisting ideological commitments have some impact on judicial decision-making, though these considerations are usually not articulated in the judgments themselves.<sup>32</sup> This is hardly a bombshell. Most people would, I think, admit that the worldview of the judge has some influence on their decision-making. But much legal discourse seems to assume that such commitments can be neutralized through the reliance on public reason. It is to this faith in the power of reason that I turn next.

### FAITH IN REASON

In Rawls's influential formulation, citizens act reasonably when they abide by the "criterion of reciprocity." They should propose terms of cooperation that they "think it at least reasonable for others to accept. . . as free and equal citizens, and not as dominated or manipulated."<sup>33</sup> If judges are to live up to this criterion, the reasons they offer for their dispositions must be independent of religion, as it would not be reasonable for a judge to expect others to accept the truth claims of their religion. But does this form of public reason provide a genuine corrective to individuals' personal moral commitments, or does it instead mask the normative foundations of a particular decision? Even if they are committed to public reason, judges, as human beings,<sup>34</sup> might be predisposed to accept

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[in line with new precedent from the US Supreme Court and] became more receptive to such claims after the passage of [the Religious Freedom Restoration Act, the congressional attempt to overturn that Supreme Court decision]."

- 29 Richard A. Posner, "The Supreme Court Is a Political Court. Republicans' Actions Are Proof," *Washington Post*, March 9, 2016, [https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1\\_story.html?postshare=2851457630960796&tid=ss\\_mail](https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html?postshare=2851457630960796&tid=ss_mail).
- 30 Another large-scale study examining US Federal Court supports this finding with respect to the influence of judges' ideologies on cases involving "campaign finance, affirmative action, sex discrimination, sexual harassment, piercing the corporate veil, racial discrimination, disability discrimination, Contracts Clause violations, and review of environmental regulations." Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation," *Virginia Law Review* 90, no. 1 (2004): 301–54, at 305. Notably, however, ideological voting was not found in "criminal appeals, takings claims, and Commerce Clause challenges to congressional enactments." Sunstein, Schkade, and Ellman, "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation," 306.
- 31 Sepehr Shahshahani and Lawrence J. Liu, "Religion and Judging on the Federal Courts of Appeals," *Journal of Empirical Legal Studies* 14, no. 4 (2017): 716–44.
- 32 For a sophisticated analysis of Supreme Court of Canada decision-making that takes into account the "norms, rules, processes, and collegial interaction (strategic or otherwise) [that] interrelate to inform behaviour," see Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: University of British Columbia Press, 2013).
- 33 Rawls, "The Idea of Public Reason Revisited," 136–37.
- 34 See Monica K. Miller, Julie A. Singer, and Alayna Jehle, "Identification of Circumstances under Which Religion Affects Each Stage of the Trial Process," *Applied Psychology in Criminal Justice* 4, no. 1 (2008): 135–71, at 162. On the importance of remembering that judges are subject to the same psychological effects as other people, Miller, Singer, and Jehle write, "It seems presumptuous, however, to assume that judges would be immune to unconscious cognitive processes such as the 'white bear' effect of ironic process theory. This theory predicts that attempting to actively avoid thinking about something leads a person to unavoidably think about it." See

arguments that are consonant with their normative commitments and communal backgrounds. Recent research suggests that people's judgments about which reasons are most persuasive are colored by their intuitive moral judgments, and their moral judgments are shaped (though not determined) by their communal affiliations.

On the basis of multidisciplinary research drawing on "social psychology, anthropology, communications, and political science,"<sup>35</sup> Dan Kahan argues that human beings "lack the psychological capacity . . . to make, interpret, and administer law without indulging sensibilities pervaded by our attachments to highly contested visions of the good."<sup>36</sup> His theory of cultural cognition holds that people are more likely to believe facts that accord with their normative commitments and be skeptical of facts that conflict with those commitments. "[R]ather than update their prior beliefs based on new information, [real-world people] tend to evaluate the persuasiveness of new information based on its conformity to their experience."<sup>37</sup> Bringing this insight to bear on legal decision-making Kahan and Donald Braman argue that

[i]t's not that political values motivate legal actors to reach particular outcomes but rather that cultural values orient them in determining what outcome is dictated by the law and evidence at hand. Legal actors with differing values will decide culturally sensitive cases differently not because they want to impose their values on others but because the mechanisms of cultural cognition move them to view the facts and the law differently.<sup>38</sup>

Moral psychologists agree that confirmation bias has been shown to be "powerful [and] ineradicable."<sup>39</sup> Moreover, they conclude from their experimental data that moral judgments are informed to a large degree by emotional reactions experienced as intuitions; "intuitions arise automatically and almost instantaneously, long before moral reasoning has a chance to get started."<sup>40</sup> Some moral psychologists claim that nearly all reasoning occurs subsequent to and in service of the initial moral emotion. Jonathan Haidt, for example, analogizes human reasoning to a press secretary: it exists to justify to others our intuitive, emotional responses.<sup>41</sup> Other psychologists take the

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also Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Inside the Judicial Mind," *Cornell Law Review* 86, no. 4 (2001): 777–830, at 780 ("wholly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations."); Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases," *Cornell Law Review* 93, no. 1 (2007): 1–45; Laura Moyer, "The Role of Case Complexity in Judicial Decision Making," *Law and Policy* 43, no. 3 (2012): 291–312; Stephan Landsman and Richard F. Rakos, "A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation," *Behavioral Sciences and the Law* 12, no 2 (1994): 113–26.

35 The Cultural Cognition Project at Yale Law School, accessed July 14, 2014, <http://www.culturalcognition.net/>.

36 Dan M. Kahan, "The Cognitively Illiberal State," *Stanford Law Review* 60, no. 1 (2007): 115–154, at 116–17.

37 Kahan, 121.

38 Donald Braman and Dan M. Kahan, "Legal Realism as Psychological and Cultural (not Political) Realism," in *How Law Knows*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Stanford: Stanford University Press, 2006), 93–125, at 94; see also Richard E. Redding and N. Dickon Reppucci, "Effects of Lawyers' Socio-Political Attitudes on Their Judgments of Social Science in Legal Decision Making," *Law and Human Behavior* 23, no. 1 (1999): 31–54, <http://dx.doi.org.proxy.library.emory.edu/10.1023/A:1022322706533>, for an experimental study of judges and law students showing that beliefs about the death penalty affect perceptions of the reliability of social science evidence.

39 Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012), 89–90.

40 Haidt, xiv.

41 Jonathan Haidt, "Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence," *Alabama Law Review* 64, no. 4 (2013): 867–80. On the basis of Haidt's work, John Campbell argues

more moderate view that while many decisions arise from intuitions, people are capable of slower, more deliberate processing. The most well-known proponent of this theory, Daniel Kahneman, nevertheless notes that our intuitive forms of decision-making are prone to exert influence upon, and sometimes dominate, our more careful reflections. This is especially the case “[i]n the context of attitudes” where the “search for information and arguments is mostly constrained to information that is consistent with existing beliefs.”<sup>42</sup> Coupled with the findings on cultural cognition, these psychological findings provide a good reason to expect that judicial determinations are not always made as pure reason from first principles,<sup>43</sup> as we might sometimes like to imagine, or even as judges may experience them.<sup>44</sup> Instead, psychological findings suggest “that personal values influence judicial decisions,”<sup>45</sup> and that judges may be subject to some of the same errors as laypeople, such as reliance on stereotypes and an inability to set aside inadmissible evidence.<sup>46</sup> Lawrence Wrightsman finds, on the basis of an empirical analysis of US Supreme Court decisions, that persuasion operates differently with respect to obviously ideological cases than with respect to non-ideological cases. In ideological cases, the final vote is less often unanimous, courts are likely to

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that markers of “intuition rationalization”—confirmation bias, substitution, creation of my-side arguments, strained reasoning, persistence, and overconfidence—can be identified in several decisions of the US Supreme Court. “Mis-Conception: Why Cognitive Science Proves the Emperors Have No Robes,” *Brooklyn Law Review* 79, no. 1 (2013): 107–74, at 134–37.

- 42 Daniel Kahneman, *Thinking, Fast and Slow*, 2011, 103–4. See Gregory R. Maio and James M. Olson, “Relations between Values, Attitudes, and Behavioral Intentions: The Moderating Role of Attitude Function,” *Journal of Experimental Social Psychology* 31, no. 3 (1995): 266–85, at 269 for a study that the authors say suggests that “people’s values, by themselves, may indicate little about their attitudes. It is only when people form attitudes specifically aimed at expressing values that the values have significant relations to attitudes. If attitudes are aimed at fulfilling some other goal (e.g., maximizing personal rewards), values will be less strongly related to attitudes.” See also Emily Sherwin, “Features of Judicial Reasoning,” in *The Psychology of Judicial Decision Making*, ed. David Klein and Gregory Mitchell (Oxford: Oxford University Press, 2010), 121–30.
- 43 Lawrence Baum offers the important reminder that there is likely significant variation across judges, questioning the apparent assumption in many studies that all judges want the same thing, which is to make good legal policy. Lawrence Baum, “Motivation and Judicial Behavior: Expanding the Scope of Inquiry,” in Klein and Mitchell, *The Psychology of Judicial Decision Making*, 3–24, at 16 and 20; see also Jennifer K. Robbennolt, Robert J. MacCoun, and John M. Darley, “Multiple Constraint Satisfaction in Judging,” in Klein and Mitchell, *The Psychology of Judicial Decision Making*, 27–38, at 28 (“no single model is likely to describe any judge all of the time”).
- 44 Joshua Greene makes the somewhat different argument that deontological reasoning is more emotion-laden and consequentialist reasoning is more cognitive. For present purposes, that some judges likely reason in a deontological fashion signals there is a risk of emotionally driven decision-making. See Joshua D. Greene, “The Secret Joke of Kant’s Soul,” in *Moral Psychology*, vol. 3, *The Neuroscience of Morality: Emotion, Brain Disorders, and Development*, ed. Walter Sinnott-Armstrong (Cambridge, MA: Massachusetts Institute of Technology Press, 2007), 79.
- 45 Rachel J Cahill-O’Callaghan, “The Influence of Personal Values on Legal Judgments,” *Journal of Law and Society* 40, no. 4 (2013): 596–623, at 601, citing Vassilis Saroglou, Vanessa Delpierre, and Rebecca Dernelle, “Values and Religiosity: A Meta-Analysis of Studies Using Schwartz’s Model,” *Personality and Individual Differences* 37, no. 4 (2004): 721–34; Sagiv, “Cultural Bias in Judicial Decision Making”; for a similar conclusion with respect to philosophy, see Kevin Patrick Tobia, “Does Religious Belief Infect Philosophical Analysis?,” *Religion, Brain and Behavior* 6, no. 1 (2016): 56–66.
- 46 Neil Vidmar, “The Psychology of Trial Judging,” *Current Directions in Psychological Science* 20, no. 1 (2011): 58–62; J. J. Rachlinski et al., “Does Unconscious Racial Bias Affect Trial Judges?,” *Notre Dame Law Review* 84, no. 3 (2009): 1195–246; Andrew J. Wistrich, Chris Guthrie, and Jeffrey J. Rachlinski, “Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,” *University of Pennsylvania Law Review* 153, no. 4 (2005): 1251–345; Landsman and Rakos, “A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation”; Jerry Kang and Kristin Lane, “Seeing through Colorblindness: Implicit Bias and the Law,” *UCLA Law Review* 58, no. 2 (2010): 465–520.



take longer rendering a decision, lawyers for the losing side usually get asked more questions, and the Court sides with the solicitor general less often.<sup>47</sup> While there are competing theories as to whether judges' ideology structures their decision-making in a "top-down" (the judge decides the outcome based on ideology and then provides the reasoning) or a "bottom-up" fashion (ideology affects the many micro-decisions required to reach a conclusion), there is fairly broad recognition that ideology and values affect judicial reasoning.<sup>48</sup> Elsewhere in the psychological literature, "several studies have demonstrated a relationship between religiosity (the quality of being religious) and personal values."<sup>49</sup> If religiosity impacts values and values affect decision-making, we have reason to think that judges' religious commitments have some impact, some of the time, on their decisions.

This is not to say that all judicial reasoning is an illegitimate exercise, untrue to liberal principles due to the potential influence of religion. Rather, decision-making is likely to be affected, some of the time, by a judge's communal and normative attachments, religious or otherwise. The frequent emphasis on separating out religious influence in particular stems from a concern that judges will rely on some privileged knowledge or insight that "others do not or cannot share."<sup>50</sup> But assuming that all religiously devout people treat the precepts of their faith as authoritative, unquestionable, revealed truths "is very much a caricature of how religion operates."<sup>51</sup> Further, if the concern is based on the problems posed by a judge's reliance on a text whose authority is contentious, it ought to be "identical if the text is Mill or Locke or Lenin or Charles Murray."<sup>52</sup> And yet, there is little or no public outcry when judges cite some such authors, even as part of the philosophical underpinnings of their reasons.<sup>53</sup>

47 Lawrence S. Wrightsman, "Persuasion in the Decision Making of the U.S. Supreme Court Justices," in Klein and Mitchell, *The Psychology of Judicial Decision Making*, 57–71, at 67.

48 Moyer, "The Role of Case Complexity in Judicial Decision Making," 292; Eileen Braman, "Searching for Constraint in Legal Decision Making," in Klein and Mitchell, *The Psychology of Judicial Decision Making*, 203–16, at 204 ("The overwhelming weight of empirical evidence demonstrates that judges vote disproportionately for outcomes that are consistent with their political policy preferences." For a recent judicial refutation of this idea, see *Canada (Citizenship and Immigration) v. Ishaq*, [2016] 1 F.C.R. 686 194, para 26 (Canada): "Unelected as we are, when we decide cases we do not rely upon our aspirations, ideological visions or freestanding opinions about what is just, appropriate and right. We do not decide cases on an ad hoc basis using tendentious reasoning based on our personal views."

49 Cahill-O'Callaghan, "The Influence of Personal Values on Legal Judgments," 605; see also Shalom H. Schwartz and Sipke Huismans, "Value Priorities and Religiosity in Four Western Religions," *Social Psychology Quarterly* 58, no. 2 (1995): 88–107, at 88: "Although theorists differ with regard to the specific values they link to religion, almost all agree that religions influence their adherents' value systems through socialization."; Stephen J. Dollinger, "Religious Identity: An Autophotographic Study," *International Journal for the Psychology of Religion* 11, no. 2 (2001): 71–92; Sonia Roccas and Shalom H. Schwartz, "Church-State Relations and the Association of Religiosity with Values: A Study of Catholics in Six Countries," *Cross-Cultural Research: The Journal of Comparative Social Science* 31, no. 4 (1997): 356–75; Sonia Roccas, "Religion and Value Systems," *Journal of Social Issues* 61, no. 4 (2005): 747–59.

50 Carter, "The Religiously Devout Judge," 941.

51 Carter, 941; see also Teresa S. Collett, "'The King's Good Servant, but God's First' The Role of Religion in Judicial Decisionmaking," *South Texas Law Review* 41 (2000): 1277–1300, at 1285–286. Avihay Dorfman makes an opposing assertion, claiming that "[c]ontrary to reasoned and unreasoned political grounds, religious-based grounds have the property of being beyond the reach of explication—or, as J. S. Mill puts it, 'inaccessible to our faculties.'" Avihay Dorfman, "Freedom of Religion," *Canadian Journal of Law and Jurisprudence* 21, no. 2 (2008): 279–320, at 310–11.

52 Modak-Truran, "Reenchanting the Law: The Religious Dimension of Judicial Decision Making," 796–808.

53 For examples of the Supreme Court of Canada's reliance on the ideas of John Stuart Mill, see *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para. 61 (Canada); *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, para.

And even when no contentious authority is cited, other interpretive commitments made by judges might involve something like an act of faith.<sup>54</sup> US Supreme Court Justice Antonin Scalia was famously committed to his originalist interpretation of the United States' Constitution,<sup>55</sup> as opposed to some of his colleagues. In contrast, Canada's Supreme Court has, in its rhetoric if not always in its decisions, followed the "living tree" metaphor, holding that constitutional principles must evolve and adapt over time.<sup>56</sup> There is nothing in the text of either country's constitution that mandates one form of analysis or another.<sup>57</sup> In other words, judges' publicly proclaimed interpretive commitments may be more akin to religious commitments than is generally believed; despite their best arguments, they are unable to convince one another of the most appropriate mode of interpretation.

### IMPLICATIONS FOR JUDICIAL DECISIONS

Taking seriously the empirically supported idea that judges draw on their personal morality to resolve disputes requires us to rethink the dominant position on the permissible role of religious reasons in state courts.<sup>58</sup> If judges' reasoning is sometimes informed by their religious background or relies on some unproven proposition, should they be explicit about it?

One response might be that, because democratic societies value transparency in decision-making, judges should present all the factors that influenced their decisions. Indeed, research in cultural cognition supports the claim that, if judges are forthright about their ideological commitments, they may be more likely to find common ground with those who do not share those commitments. Writing of the US Supreme Court, Kahan argues that

much like empirical arguments in policy debates, the devices the Court uses to justify its decisions—its own use of empirical data; its use of theories that equate one position with "reason" and "neutrality" and the other with "bias" and "will"; its use of intemperate and denunciatory rhetoric (particularly in dissents)—evince self-deception and breed distrust.<sup>59</sup>

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- 14 (Canada); *R. v. Jones*, [1986] 2 S.C.R. 284, para. 76 (Canada, Wilson J., dissenting). See also *R. v. Labaye*, [2005] 3 S.C.R. 728, para. 105 (Canada), where the dissenting judges say that the "philosophical underpinnings of the majority's harm-based approach are found in the liberal theories of J. S. Mill." For a citation of John Locke, see *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 749. For Wilson J.'s references to G. W. Hegel see *Perka v. The Queen*, [1984] 2 S.C.R. 232, 271 (Canada), and *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, para. 155 (Canada).
- 54 See John Gardner, "Law as a Leap of Faith," in *Faith in Law: Essays in Legal Theory*, ed. Peter Oliver, Sionaidh Douglas Scott, and Victor Tadros (Oxford: Hart Publishing, 2000), 19–31.
- 55 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law: An Essay* (Princeton University Press, 1997); Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57, no. 3 (1989): 849–66.
- 56 For arguments that the Supreme Court of Canada has never truly rejected originalism and, in fact, relies on originalism on many occasions, see Léonid Sirota and Benjamin Oliphant, "Has the Supreme Court of Canada Rejected Originalism?" *Queen's Law Journal* 42, no. 1 (2016): 107–64; Léonid Sirota and Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence," *University of British Columbia Law Review* 50, no. 2 (2017): 505–76. For an originalist argument in favor of gender equality under the Charter, see Kerri A. Froc, "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment,'" *Review of Constitutional Studies* 19, no. 2 (2014): 237–79.
- 57 Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Canada).
- 58 Modak-Truran, "Reenchanted the Law," 752.
- 59 Dan M. Kahan, "Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law," *Harvard Law Review* 125, no. 1 (2011): 1–77, at 74.

In response, Kahan suggests two techniques of writing by which judges can be transparent and defuse charges that their decisions are completely driven by ideology. The first, which Kahan calls *aporia*, calls on judges to acknowledge the complexity of the cases they are deciding. “Aporetic engagement does not preclude a definitive outcome or resolution. But it necessarily treats as *false*—a sign of misunderstanding—any resolution of the problem that purports to be unproblematic.”<sup>60</sup>

The second technique, more relevant here, Kahan calls *expressive overdetermination*. This has two requirements. First, expressive overdetermination requires *candor*.<sup>61</sup> Decision makers should “acknowledge, and not conceal, how they understand a law or policy proposal to express meanings *distinctive* of their own worldviews.”<sup>62</sup> Though decisions could continue to be justified on instrumental considerations, decision makers could not insist that the policy was disconnected from any ideological commitment. The second requirement, *cooperative overdetermination*, would oblige a judge to “find alternative ways of framing [decisions], that permit persons who hold cultural outlooks opposed to their own to defend the law as expressing meanings distinctive of their worldviews as well.”<sup>63</sup> Kahan says that this aspect of expressive overdetermination quells the threat to group-based identity that emerges from a policy justified in purportedly neutral terms.<sup>64</sup>

Though this aspect of Kahan’s research is not empirically proven, there is “modest empirical support for these conjectures.”<sup>65</sup> For instance, Tom Tyler and Gregory Mitchell examined the US Supreme Court’s abortion decisions.<sup>66</sup> “For respondents who *disagreed* with the outcomes, the belief that the Court should nevertheless be empowered to determine the constitutionality of abortion was strongly associated with the perception that the Court had given fair and open-minded consideration to opposing arguments.”<sup>67</sup>

Kahan points to a number of US Supreme Court decisions displaying cooperative overdetermination. In the decisions on the University of Michigan’s affirmative action programs “the Court permitted the law school to pursue the goal of ‘diversity’ by treating race as an indeterminate amorphous ‘plus factor,’ but struck down the college’s mechanical point system because it denied applicants ‘individualized consideration.’”<sup>68</sup> In so doing, the Court supported a liberal policy preference but infused it with the ideology of individualism cherished by US conservatives. Similarly, the US Supreme Court treated public displays of the Ten Commandments differently in two cases. “In *McCreary County v. ACLU of Kentucky*, it struck down a conspicuous, ornamental courthouse display that evinced a ‘sectarian spirit.’ In *Van Orden v. Perry*, in contrast, it upheld ‘passive’ inclusion of the Commandments in a group of monuments calling attention to diverse

60 Kahan, “Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law,” 62 (emphasis in original).

61 Kahan, 62.

62 Kahan, “The Cognitively Illiberal State,” 145. Micah Schwartzman helpfully distinguishes candor from sincerity: “a person might make sincere statements . . . without necessarily being candid. Even a speaker who means what she says may not say everything necessary for her to be considered candid.” Schwartzman’s argument focuses principally on the value of judicial sincerity, but he claims that one of its foundations, “the epistemic value of publicity[,] provides at least some support for the broader conception of judicial candor as full disclosure of relevant information.” “Judicial Sincerity,” *Virginia Law Review* 94, no. 4 (2008): 987–1027, at 994, 1017.

63 Kahan, “The Cognitively Illiberal State,” 145 (emphasis in original).

64 Kahan, 145.

65 Kahan, 148.

66 Kahan, “Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law,” 63.

67 Tom R. Tyler and Gregory Mitchell, “Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights,” *Duke Law Journal* 43, no. 4 (1994): 703–815.

68 Kahan, “Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law,” 63.

'strands in [Texas's] political and legal history.'"<sup>69</sup> In the latter case, the conservative policy preference was upheld on the basis of anti-sectarianism and diversity, values more closely associated with American liberals. Kahan claims that such overdetermination can serve to counter ideological polarization and help avoid delegitimizing the court.

As a Canadian counterpoint to Kahan's examples, consider *Chamberlain*, in which the Supreme Court read a legislative requirement that schools be operated under a policy of "strict secularism" as mandating inclusiveness rather than the exclusion of religion from school board policy discussions. The Court held that

The Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. . . . Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. . . . This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.<sup>70</sup>

One might understand this passage as performing, or at least gesturing at, cooperative overdetermination. The language of secularism, a value associated with a liberal perspective, is read to create space for religious viewpoints in public decisions, a result more consistent with conservative preferences. Adding another layer, the result is justified through the more liberal value of inclusion. On the other hand, once the value of inclusion is cited, it functions to exclude those perspectives that would themselves be exclusive of other members of the school board's parent and student population. This more liberal result is not justified through a particularly conservative value.

Despite Kahan's examples of cooperative overdetermination, he does not cite any examples of expressive overdetermination's requirement of candor. I think one would be hard pressed to find such a decision in the contemporary Canadian context as well, especially where the judge was candid about the impact of their religious background on their decision-making. To imagine what such a decision might look like, consider *Chamberlain* again. While the above-cited passage relies on the value of "fairness," it presupposes a view of fairness that treats all worldviews as presumptively equal. The Court does not explain the basis for this presumption, and the requirement of candor is thus arguably not met. The decision might have been more candid had it made reference to a comprehensive perspective that justified the equal recognition of all social groups. This could be done with reference to a monotheistic God who creates all people in a divine image, or with reference to a Taylorian view, which holds that, at least presumptively, all cultures are entitled equal recognition and respect because they have provided a horizon of meaning for many people over a long period of time.<sup>71</sup>

While this kind of candid judicial reasoning might satisfy a desire for transparency and provide fuller justification for a particular decision,<sup>72</sup> it raises challenges related to the legitimacy concerns I discuss above. The gravity of such concerns is especially apparent when viewed from the perspective of the litigant. Litigants have a legitimate interest in providing courts with all the arguments that

69 Kahan, 68.

70 *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 (Canada).

71 *Id.* at para. 19.

72 Taylor, "The Politics of Recognition."

might assist their case.<sup>73</sup> If appearing before a judge who has cited Catholic texts in the past, the litigant might want to show how their arguments are consistent with Catholic doctrine. If both sides to a dispute are self-represented, a litigant who shares the judge's religious perspective may have a perceived advantage in constructing an argument that can better convince the judge in a difficult case. Even assuming that litigants would have similar access to advocates skilled in tailoring arguments to particular judges, legitimacy problems remain. The advocate speaks for the litigant. It does not accord with religious freedom to encourage litigants, even through their counsel, to make arguments in a state court based on a comprehensive view that is not their own rather than some potentially shared principle. The implications for litigants' (and other legal subjects') liberty and equality interests are a high price for the greater transparency that would be gained by a judge explicitly referring to the comprehensive doctrine that guided their decision.<sup>74</sup>

The notion of judicial self-consciousness may provide a compromise solution to this dilemma, and offer an alternative to both the public reason and expressive overdetermination models. In the context of encouraging judicial openness to different forms of gender, Jennifer Nedelsky writes that self-consciousness is the best hope for judges to become aware of their prior commitments:

We will all, inevitably, get caught in our preconceptions, our commitments, our predilections in ways that blind us to the full scope of the issues we actually care about—or would wish to care about if we could see them. Only an ongoing self-consciousness of the inevitability of this blindness will welcome disruptive insight, that literally allows us to see things differently.<sup>75</sup>

This kind of self-consciousness would be similarly helpful for judges to reflect on how their prior moral and religious commitments inform their decision-making. A change in the practices of judicial decision-making that encourages judges to be conscious of their own situated perspectives might be the most practical solution to the competing demands of transparency and the avoidance of the state's adoption of a particular comprehensive perspective.<sup>76</sup>

Modak-Truran has engaged with these competing demands, and advocates this kind of self-consciousness with respect to religion. Because he writes in the American context, Modak-Truran is particularly concerned with the possibility that a judicial decision citing a particular religious doctrine would violate the Establishment Clause in the First Amendment to the US Constitution.<sup>77</sup> Although other states' constitutional documents, such as Canada's, may not contain a similar provision, the normative concerns regarding the official adoption of a particular religion apply. Indeed, since the early days of *Charter* litigation, Canadian courts have held that laws with a religious purpose are unconstitutional, showing judicial support for non-establishment,<sup>78</sup>

73 In this respect, I differ from Scott C. Idleman who argues that judges should be at least as candid about the impact of religious sources as they are about the impact of nonreligious sources. See "The Concealment of Religious Values in Judicial Decisionmaking," *Virginia Law Review* 91, no. 2 (2005): 515–34, at 533–34.

74 Idleman, 528.

75 Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2012), 344.

76 Nedelsky, 344.

77 Idleman, "The Concealment of Religious Values in Judicial Decisionmaking," 531–33; Hon. Kermit V. Lipez, "Is There A Place for Religion in Judicial Decision-Making?," *Touro Law Review* 31, no. 1 (2014): 133–148, at 147.

78 Modak-Truran spends some time explaining that though the text of the First Amendment only specifically applies to Congress, there is good reason to assume that it applies to judicial decisions as well, see, "Reenchanting the Law," 767.

reframed in the more recent jurisprudence as religious neutrality.<sup>79</sup> Arguably, the same logic would apply to judicial decisions that purposely relied on the dictates of a specific religion.

Modak-Truran argues, however, that there is an alternative that recognizes the inevitability that judges will draw on their own comprehensive doctrines and avoids the potentially unconstitutional results created by the direct citation of religious doctrines. The crucial first step is the recognition that there are various stages to the adjudicative process. "Deliberation and explanation are separate stages of judicial decision making that should be kept distinct."<sup>80</sup> For Modak-Truran, direct engagement with religious views (recalling that Modak-Truran adopts a very wide understanding of religion) is necessary and should be carried out in the deliberation stage. However, given the problems posed by the explicit reference to religious traditions in judicial reasons, "judges' religious convictions should only implicitly inform the legal explanation of their decision in their written opinions."<sup>81</sup>

Modak-Truran's model is appealing in that it is more realistic about judges' propensity (indeed their need) to draw on their own moral perspectives, particularly to resolve difficult cases. In Stephen Carter's terms, this view is less "denigrating" to religion than the mainstream view, which expects judges to isolate and compartmentalize their religious beliefs when engaging in the act of judgment.<sup>82</sup> This model recognizes that religious beliefs can serve an important function for the adjudicative process. On the basis of their comprehensive perspectives, judges can continuously reevaluate the legal principles and extra-legal norms established by previous decisions.<sup>83</sup> Further, consistent with the more nuanced view of religion as being related to reason, rather than being opposed to or independent of it, new cases can cause judges to reflect critically on their own normative commitments.

The self-consciousness model also avoids some of the legitimacy problems posed by judges' explicit reference to comprehensive perspectives because the cases are explained only on the basis of noncomprehensive norms. Because these norms may be justified by a number of comprehensive norms, a reasonable pluralism (to use Rawls's phrase) of comprehensive perspectives is maintained and the Establishment Clause is not violated. This, in Modak-Truran's view, provides a principled basis for maintaining the law's indeterminacy,<sup>84</sup> leaving the decision as something like an "incompletely theorized agreement"<sup>85</sup> (or perhaps disagreement, if there is a dissenting view).

Though Modak-Truran's view of how judges should behave is quite different from Rawls's, the use of Rawls's concept of "reasonableness" is justified here because not every comprehensive perspective agrees on noncomprehensive norms. To return to the *Chamberlain* example, the noncomprehensive norms relied upon by the Court for its definition of "secular" were "accommodation, tolerance and respect for diversity."<sup>86</sup> Despite the high rhetorical currency of these notions in many circles, not all comprehensive doctrines would necessarily ascribe to them, at least as they are relied upon by the Court. Some religious traditions might draw the boundaries of tolerance in different places; critics on the left have also rejected the language of tolerance as a mechanism for the depoliticization of legitimate disputes and a tool for justifying military campaigns.<sup>87</sup> In other words, all decisions might attract disagreement among judges or citizens, which may

79 *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3 (Canada).

80 Hamill, "Judges and Religious-Based Reasoning: A Response to Ginn and Blaikie."

81 Modak-Truran, "Reenchanting the Law," 714–15.

82 Carter, "The Religiously Devout Judge," 940.

83 Carter, 940.

84 Modak-Truran, "Reenchanting the Law," 810–11.

85 Modak-Truran, 812.

86 Cass R. Sunstein, "Incompletely Theorized Agreements," *Harvard Law Review* 108, no. 7 (1995): 1733–72.

87 Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006).

sometimes be on the basis of comprehensive doctrines; this disagreement might simply be the price of a functioning judicial mechanism that seeks to resolve disputes with some finality.

Despite Modak-Truran's attempt to reconcile Establishment Clause concerns with the recognition that moral judgments presuppose an answer to basic existential questions, it might still be argued that the legitimacy problems posed by judges imposing their own comprehensive norms on others remain. Because the model prohibits judges from referring to their comprehensive norms in the explanation phase of adjudication, some may see the legitimacy problem as intensified. Not only does the judge apply their own comprehensive view to resolve the dispute, but they do so as an open secret. An objector might posit that, at the very least, litigants and members of the public should be entitled to know all the bases of a decision that implicates their interests, in order to be able to subject that decision to the proper scrutiny. In defense of the self-consciousness model, however, the legitimacy predicament will persist as long as humans carry out the work of judgment on behalf of the state. People cannot help but have some comprehensive view or metaphysical assumptions even if they are not fully aware of these. The best hope, then, is for judges to be more fully self-conscious of this fact, and use their comprehensive view in order to strengthen their own decisions by providing a source for the reevaluation of noncomprehensive norms.<sup>88</sup> As such, while the written decisions may look like the kind of reasons that Rawls would endorse due to the deliberate omission of comprehensive views, the method for arriving at these views is quite different from what Rawls might have advocated.

If judges are to understand the impact of their prior commitments on their reasoning process in order to verify whether their reasons are justifiable to those who do not share their reasons, the first step is to engage directly with their religious or other comprehensive perspectives. Writing of ways to reduce the impact of stereotypes on judgment, Gary Blasi notes: "[a]wareness by targets of these paths to prejudice is generally a condition precedent to reducing their effects . . . none of us can do much about prejudices of which we are completely unaware."<sup>89</sup> This may seem counterintuitive. If one wants to reduce the impact of a stereotype or a religious norm, why talk and think *more* about them?<sup>90</sup> Because without being explicitly engaged, these prior notions can operate as "silent arguments," and the best way to subject them to scrutiny is to consciously answer them.<sup>91</sup>

Judicial institutions already have some mechanisms that can encourage judges to reflect on whether their judgments are justifiable to someone who does not share their comprehensive view. The existence of appellate courts and the possibility of reversal provides an incentive for judges to ensure their reasons are persuasive to an audience that might not share their worldviews. In some circumstances, the institution of multi-member panels has been shown to have a

88 See Benjamin L. Berger, "Against Circumspection: Judges, Religious Symbols, and Signs of Moral Independence," in *Religion and the Exercise of Public Authority*, ed. Benjamin L. Berger and Richard Moon (Oxford: Hart Publishing, 2016), 23–39.

89 Gary Blasi, "Advocacy against the Stereotype: Lessons from Cognitive Social Psychology," *UCLA Law Review* 49, no. 5 (2002): 1241–1282, at 1275.

90 Scott Altman has argued that, if judges were more introspective, the risk increases that they will see themselves as less constrained by law and then manipulate the law to suit their preferences more often. Scott Altman, "Beyond Candor," *Michigan Law Review* 89, no. 2 (1990): 296–351, at 319. I think the literature on implicit bias, discussed below, provides a partial answer to this argument, as it suggests that knowledge of implicit bias can sometimes reduce the influence of that bias.

91 Albert Moore, Paul Bergman, and David Binder, *Trial Advocacy: Inferences, Arguments and Techniques* (St. Paul: West, 1996), 85, cited in Blasi, "Advocacy against the Stereotype," 1278; Linda Babcock, George Loewenstein, and Samuel Issacharoff, "Creating Convergence: Debiasing Biased Litigants," *Law and Social Inquiry* 22, no. 4 (1997): 913–926, at 916.

constraining effect on judicial decision-making. The presence of a “whistleblower judge”—one who does not share the policy preferences of their colleagues and could expose them for disobeying precedent—“significantly increases the chances that the court majority will follow doctrine.”<sup>92</sup> Even where precedent is not fully controlling, “whistleblowers” might call attention to the reasons of their colleagues that they believe cannot be shared across comprehensive perspectives. In this regard, efforts to diversify the bench<sup>93</sup> (for example, in terms of gender, ethnicity, race, religious background, social class) could serve as an additional check on the background assumptions that might inform judgment. There is reason for some caution here, however, as a recent study found no evidence of panel effects in religious freedom cases brought in the US Federal Courts.<sup>94</sup>

In addition to the above, we might imagine other methods by which judges could engage more directly with their religious and other normative priors on an explicit and regular basis. There are, however, challenges specific to the judicial setting in institutionalizing practices that encourage self-consciousness in other fields. For instance, scholars who employ qualitative methods<sup>95</sup> often rely on a journaling process to examine how their own “conceptual baggage”—assumptions, beliefs, backgrounds, expectations—“influences knowledge production and reproduction by affecting what questions are asked, from which angle issues are taken up, what social realities are considered worth pursuing, and which group’s experiences are legitimized and theorized.”<sup>96</sup> Engaging with this baggage explicitly and in writing helps researchers assess the effect of their experience on their research. They can then incorporate these insights into the research design.<sup>97</sup>

A similar practice might be useful for judges in order to make clear to themselves the potential unconscious effects that their backgrounds have on the ways they read, hear, and reason through

92 Frank B. Cross and Emerson H. Tiller, “Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals,” *Yale Law Journal* 107, no. 7 (1998): 2155–76, at 2176; Sunstein, Schkade, and Ellman also note the whistleblower effect as part of the general phenomena of panel effects, which also include collegial concurrence and group polarization. “Ideological Voting on Federal Courts of Appeals,” 337–46.

93 See Sean Fine, “Liberal Appointments Signal Intent to Diversify Canadian Judiciary,” *Globe and Mail*, June 20, 2016. Canada already has one legislated (and now constitutionalized) form of mandatory diversity in that three judges of the Supreme Court must be appointed from among the judges or advocates of Quebec. See Reference re Supreme Court Act, ss. 5 and 6, [2014] 1 S.C.R. 433 (Canada). There has been a regular practice of filling the remaining six seats in way that gives some representation to each of Canada’s regions.

94 Shahshahani and Liu, “Religion and Judging on the Federal Courts of Appeals.”

95 For examples of qualitative methods in legal scholarship, see Lisa Webley, “Qualitative Approaches to Empirical Legal Research,” in *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert M. Kritzer (Oxford: Oxford University Press, 2010), 926–50; Angela Campbell, “Bountiful Voices,” *Osgoode Hall Law Journal* 47, no. 2 (2009): 183–234; Angela Campbell, “Bountiful’s Plural Marriages,” *International Journal of Law in Context* 6, no. 4 (2010): 343–61; Anne Saris and Jean-Mathieu Potvin, “Canadian Muslim Women and Resolution of Family Conflicts: An Empirical Qualitative Study (2005–2007),” in *Law and Religion in the 21st Century: Relations between States and Religious Communities*, ed. Silvio Ferrari and Rinaldo Cristofori (Surrey: Ashgate Publishing Limited, 2010), 337–47; Shauna Van Praagh, “The Chutzpah of Chasidism,” *Canadian Journal of Law and Society* 11, no. 2 (1996): 193–216. I used this method to study religious freedom litigation in Canada, and the resulting analysis can be found in Howard Kislowicz, “Faithful Translations? Cross-Cultural Communication in Canadian Religious Freedom Litigation,” *Osgoode Hall Law Journal* 52, no. 1 (2014): 141–89; Howard Kislowicz, “Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation,” *Queen’s Law Journal* 39, no. 1 (2013): 175–222; Howard Kislowicz, “Law, Religion, and Feeling Included/Excluded: Case Studies in Canadian Religious Freedom Litigation,” *Canadian Journal of Law and Society* 30, no. 3 (2015): 365–80.

96 Ping-Chun Hsiung, “Conceptual Baggage,” *Lives and Legacies: A Guide to Qualitative Interviewing*, accessed May 31, 2016, <http://www.utsutoronto.ca/~pchsiung/LAL/reflexivity/baggage>.

97 Joseph Alex Maxwell, *Qualitative Research Design: An Interactive Approach* (Thousand Oaks: Sage, 1996), 28–29.



cases. The obvious downside with this method is that I expect it would be hard to convince judges to adopt it. While training in this method could be integrated into what Canada's National Judicial Institute<sup>98</sup> calls the "craft of judging,"<sup>99</sup> judges are likely to be skeptical of journaling reflexively because of the unfamiliarity of the process. Moreover, many judges have a full docket and may have to make many decisions in the same week.<sup>100</sup> Persuading them to add this step to their process, which is time-consuming and cognitively taxing, would be a hard sell.

Another approach would be to engage in dialogue with another person in order to uncover and assess the judge's "conceptual baggage." This would work best if the partner in dialogue did not share the background of the judge (for example, the person has different religious traditions, political affiliations, or socioeconomic status). As Kahan points out, people are much more likely to see the flaws in the underlying facts and assumptions that support a position they do not share.<sup>101</sup> Such a role might, in theory, be fulfilled by the judge's law clerk. The biographers of Chief Justice Dickson and Justice Wilson write that those justices encouraged their clerks to serve as sounding boards and challenge their ideas.<sup>102</sup> Further, "the norm is that the chamber of each justice prepares for oral argument independently,"<sup>103</sup> which suggests that there is already a stage in the decision-making process where a justice can exchange ideas with their own clerks without knowing other justices' position (though clerks may share ideas among themselves), which may assist in keeping comprehensive doctrines implicit rather than explicit in the final decision.

On the other hand, Emmett Macfarlane's interviews of Supreme Court of Canada justices and law clerks show that not all judges engage with their clerks in the same open way as Justices Wilson and Dickson reportedly did. One justice "tells the clerks at the start of each year that they 'are not there to be advocates.'"<sup>104</sup>

Skepticism about using law clerks in this way is also supported by empirical research from the US, which suggests that justices at the Supreme Court and judges at the Federal Courts are increasingly likely to hire law clerks with policy preferences similar to themselves.<sup>105</sup> Moreover, the power imbalance between judge and clerk might be a serious impediment to the kind of open conversation that would be beneficial. As such, an existing law clerk would seem a poor choice in assisting a judge to attain more self-conscious reasoning.

Father Ron Davis, who served for many years as a trial and then appellate judge in California and later became an Episcopalian priest, has previously suggested drawing on local clergy in a volunteer capacity as dialogue partners.<sup>106</sup> However, adding a new person into the equation of judicial

98 "National Judicial Institute (NJI) is an independent, not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally." "About the NJI," National Judicial Institute, accessed July 24, 2017, <https://www.nji-inm.ca/index.cfm/about/about-the-nji/>.

99 See National Judicial Institute, *Judicial Education Overview and Education Resources*, <https://www.nji-inm.ca/index.cfm/publications/nji-education-course-calendar/>.

100 For an account of the increase in the US federal judicial caseload over time, being more than 64 times greater in 2013 than it was in 1900, see Albert Yoon, "Law Clerks and the Institutional Design of the Federal Judiciary," *Marquette Law Review* 98, no. 1. (2014): 131–150, at 133–34.

101 Kahan, "The Cognitively Illiberal State."

102 Macfarlane, *Governing from the Bench*, 108.

103 Songer, *The Transformation of the Supreme Court of Canada*, 119.

104 Macfarlane, *Governing from the Bench*, 108.

105 Lawrence Baum, "Hiring Supreme Court Law Clerks: Probing the Ideological Linkages between Judges and Justices," *Marquette Law Review* 98, no. 1 (2014): 333–60, at 359.

106 Father Ron Davis, "Religion's Place in Judicial Decision-Making," *Sacramento Lawyer Magazine*, June 2015, 20–21.

decision-making raises a fairness problem: the parties do not have an opportunity to make representations with respect to this person's views. A discussion on the merits of matters that were not argued in open court is arguably quite different than a conversation between a judge and their clerk on the merits of the arguments raised by the parties.

In sum, there are practical obstacles to implementing a journaling practice in that it would be a time-consuming task about which many judges are likely to be skeptical. Even if there was some political will behind implementing such an idea, principles of judicial independence would likely preclude a legislature from making such a practice mandatory. As to allowing judges to explore their "conceptual baggage" in conversation with another person, there are both principled and practical obstacles. There are legitimate fairness concerns with such a practice, and the time required for such conversations and potential costs if the dialogue partners were remunerated make the adoption of such a practice unlikely. Perhaps the challenges of implementing these practices in the judicial context partially explains why judicial self-consciousness can prove elusive. In an adversarial system, judges must usually decide based on facts and law that have been argued by the parties. Their schedules are busy and they may legitimately feel pressed to deliver judgments in a reasonable time in order to do justice between the parties; adding new steps to their decision-making is unlikely to be popular among them. Perhaps the best that can be hoped for is to enhance judicial education about increasing self-consciousness.

## CONCLUSION

I have argued that continued adherence to the idea that judges can be neutral as between all comprehensive perspectives is inconsistent with the recognition that all people are situated in a particular context, and the developing social science supporting the view that such context affects decision-making. Maintaining that judges should deliberately avoid engaging with their comprehensive perspectives may serve to mask to the judges themselves the impact that such perspectives have on their decisions. While one response would be that judges should explicitly discuss religious or comprehensive views in their decisions, concerns about maintaining an open and relatively pluralistic legal system, where law is not rooted in a comprehensive perspective to the exclusion of others, stand in opposition to this option. The self-conscious model of judgment I advocate is based, first, on the recognition that judges inevitably draw on their comprehensive perspectives. From this follows not an increased call for neutrality, but advocacy for self-conscious engagement with the comprehensive perspective. In other words, the model acknowledges judges' humanity and rejects the idealized notion of a judge with no normative baggage. Instead, the model puts its faith in the possibility that, once judges have come to a decision in conversation with their comprehensive view, they can support their decisions by reference to noncomprehensive norms that can be shared across comprehensive perspectives.

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