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### Reflections/Lovingkindness

Abner S. Greene

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## REFLECTIONS/LOVINGKINDNESS

*Abner S. Greene\**

*In the beginning was the Word.*<sup>1</sup>

The human use of language serves a dual purpose—language allows us to reach toward noumena, things in themselves, while simultaneously reminding us that we are in need of such a tool to move from our human mortal limited finitude to apprehend essences (if only dimly).

As I understand it,<sup>2</sup> at the core of Christian theology is a similar understanding of the Word, and thus of God—God is eternal, divine, but also has come into being in time.

So we spend our days as (perhaps, to an agnostic) children of a God who doubles in the way that language doubles; if living ethically is living fully who we are,<sup>3</sup> then we are meant to live both by seeking a connection to eternity, to universals, to other human beings and animals and nature in a way that joins us in a common quest for overcoming the limits of mortal existence, and simultaneously by embracing such limits, in all their evanescent sweetness.

One needn't be a Christian to find the claim that Jesus is both fully human and fully divine to be an apt representation of what we limited human beings seek to attain—intimations of divinity; moments of unmediated joy grounded in awareness (perhaps unconscious, but present) of our mortality.

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\* Leonard F. Manning Professor, Fordham Law School. Many thanks to Elizabeth Adams for an enlightening conversation about this draft and our mutual admiration for JCN.

<sup>1</sup> *John* 1:1.

<sup>2</sup> For what it's worth, I consider myself an open-ended agnostic on the God question. I was raised as a Reconstructionist Jew.

<sup>3</sup> “If you bring forth what is within you, what you bring forth will save you. If you do not bring forth what is within you, what you do not bring forth will destroy you.” ELAINE PAGELS, *BEYOND BELIEF* 237 (2004) (translating the Gospel of Thomas).

What is it like to live in this between, as a person and in one's work? How can we seek to find a connection to the divine—in our own way, perhaps connected to a theistic religion, perhaps otherwise—while remaining fully grounded in the small pleasures of everyday existence?

For many years, I've been seeking to understand the part of being human that points toward the eternal and the part that is very much of this world, and the relationship between the two. John Copeland Nagle, more than anyone I have known, lived his life in a quest to find the balance between our relation to the divine and our relation to the glories of the created world.

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John left unfinished a manuscript on Christian humility and environmental law.<sup>4</sup> He states his “lifetime project” to be “to learn how to best integrate Christian teaching and environmental law,”<sup>5</sup> and specifies that his “normative perspective is theocentric,” that is, that “[h]uman welfare and the welfare of the rest of the created world are important to us precisely because they are important to God.”<sup>6</sup>

As part of this project and theocentric perspective, John also announces the theme of Christian humility—for there to be a single Christian perspective on environmental law (or to claim one) “would not be humble.”<sup>7</sup> In a beautiful passage, John lays out the first of two pillars of humility:

[H]umility emphasizes human limits. We have limited knowledge of ourselves, of others, and of the world around us. We are willing to learn new things and to change our minds. We have limited skills and limited abilities to affect the results that we desire. We make mistakes. We can honestly assess ourselves and recognize the value of others. We are not impressed with social rank. We understand our place in the world and recognize that we are not the most important thing in it. We are dependent both on other people and on the natural resources that this world provides. We value things apart from their value for us. We acknowledge that our values are not always shared by others.<sup>8</sup>

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4 I understand that the working title was God's Creation & Our Laws.

5 John Copeland Nagle, *Making Environmental Law Humble* ch. 1, at 1 (Feb. 18, 2019) (unpublished manuscript) (on file with Professor Bruce Huber).

6 *Id.* at 9–10.

7 *Id.* at 12.

8 *Id.* ch. 2, at 3 (on file with author); John Copeland Nagle, *Humility and Environmental Law*, 10 LIBERTY U.L. REV. 335, 341 (2016).

The second pillar of humility “looks at others”; it respects their knowledge; “it appreciates that the values which others hold dear may be diametrically different from our own.”<sup>9</sup>

Although John’s focus in the manuscript is on humility and environmental law, he pauses to make a broader point about humility and norms, or values, or morality, more generally. First, he writes this: “Perhaps one of the most vital, yet most overlooked, lessons of humility is that we do not share the same values. Much of the sharp political divide that has emerged in the United States results from conflicting moral commitments.”<sup>10</sup> And then this:

The members of our pluralist society hold many differing ideas about such fundamental questions as the meaning of life, the beginning and end of life, the proper balance between individual desires and community aspirations, the nature of the common good, and the role of the government in pursuing the common good.<sup>11</sup>

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For some time, I have been constructing arguments for a broad view of judicial exemptions (and legislative accommodations) for religious practice. I have developed several intersecting arguments; one in particular overlaps with John’s focus on humility, and although I can’t prove it, it’s possible that my interest in this field (and, more specifically, the piece that overlaps with humility) comes from my friendship and conversations with John.

Why might we think it necessary, at times, to exempt from law a person with religious beliefs that may seem obscure to others, when that person has lost the legislative battle over that law? Don’t all of us have to suffer the losses as well as the gains of a robust, open, sometimes fractious democratic lawmaking process? One reason to think judicial exemptions for religious practice may sometimes be warranted is that the legislative process may not be fully open, and thus exemptions may be a proper remedy for any process exclusions. This is an argument I advanced early in my career, in *The Political Balance of the Religion Clauses*.<sup>12</sup> Under the Establishment Clause, legislation may not be based on express, predominant, religious justification; this is

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<sup>9</sup> *Id.*; see also John Copeland Nagle, *Humility and Environmental Law*, 10 LIBERTY U.L. REV. 335, 341 (2016).

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 13; John Copeland Nagle, *Humility and Environmental Law*, 10 LIBERTY U.L. REV. 335, 362 (2016).

<sup>12</sup> Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993).

because reference to an extra-human source of normative authority (God, perhaps) is sectarian in an exclusionary way; because we have somewhat silenced religious arguments in lawmaking, we should compensate via the Free Exercise Clause by sometimes granting judicial exemptions (if the legislature hasn't included accommodations in the law).

Later, in my book *Against Obligation*, I advanced a broader version of a similar argument.<sup>13</sup> The predicate this time was not the Establishment Clause bar on laws based in express, predominant, religious justification, but instead the combination of (a) a case against a presumptive (and overridable) moral duty to obey the law (i.e., all laws, all of the time; what is known as the issue of “political obligation”), (b) a correlative case against the state’s claim of justified across-the-board authority, and (c) a case for what I call “permeable sovereignty,” that is, that the state and other sources of normative authority (such as religion) should be presumptively on par with each other. The combination of these arguments suggests that accommodations and exemptions may allow these other sources of authority to remain prominent in the lives of adherents and ameliorate the state’s otherwise unsustainable wholesale claims of authority.

The *Political Balance* and *Against Obligation* arguments are tradeoff or compensation arguments, and may be seen as versions of our public-private tradeoff—allowing people rather full purchase for non-state sources of normative authority to govern their lives, while recognizing the role of the state as monopolist over the use of (at least asserted) legitimate force, often protecting legitimate public interests. At the heart of these arguments is a robust understanding of political pluralism as consistent with liberal democracy. And at the heart of this understanding is an argument from a broad political agnosticism, or what one might call humility.

Liberalism, born in religious toleration, is properly cautious about its normative claims. Some disagree and think this is a facade and that liberalism asserts just as many bedrock points (such as toleration and autonomy) as any other -ism. But if we properly distinguish comprehensive from political liberalism, and deem the latter to be the appropriate grounding for the state, then we properly insist that the state be cautious regarding what it deems bedrock, at least in its regulatory role. If this means toleration is bedrock for the liberal state, then so be it; the alternative is the intolerance of theocracies or secular analogues. Liberal normative caution is based in both epistemic and normative humility. We must move forward based on current

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13 ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

knowledge—but with an openness to revision and being wrong. We can't help but move forward based on our current view of right and wrong—but with an openness to revision and being wrong.

In this way, political liberalism is anti-foundationalist. Political agnosticism, understood as incorporating types of humility, should lead to caution in lawmaking, openness to revision, and a regime of legislative accommodation and judicial exemption that recognizes competing approaches to knowledge and normativity.

In the passages quoted above from John's work on humility, John mentions a duality in humility—acknowledging one's own limits while respecting the knowledge and values of others. And he writes about living in a society in which people sometimes have different values and moral commitments. John wrote these words as part of a larger project about environmental law, in an attempt (I think) to bridge a cultural divide on the subject. But the words could just as well have been written about the kinds of problems that arise in the area of religious accommodations and exemptions.

For we accommodate each other, in a culturally and religiously diverse nation, in many ways. There's an argument that this is just a *modus vivendi*, but the deeper and better argument is that liberal democracy demands this kind of accommodation. So, we might reach accommodations (I call it that rather than compromises) over environmental regulation, not to halve the gains and losses, but out of humble caution and respect. These accommodations may be made up front, in the process of crafting legislation and regulation, or at the back end, after the legislative process is done, through judicial exemption. For my purposes here it doesn't matter which we're discussing. Baked into our constitutional order is an appreciation for political agnosticism—I have called this “multiple repositories of power,” or “multiple sources of authority.”<sup>14</sup> The point is not just the Madisonian one of checking faction and not just the practical one of keeping one side from gaining too much power and not just the libertarian one of insuring liberty by limiting state authority. Instead, we can see the various ways we divide power—including by accommodating views and values different from ours—as a virtue, not merely as a check. One might call it a kind of political empathy.

There are many complexities here, not least of which is knowing when to accommodate a position that one firmly believes is wrong or incorrect. For to be an advocate of broad political pluralism does not equal being a skeptic or a moral coward or someone who can't take

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14 *Id.* (subtitled “The Multiple Sources of Authority in a Liberal Democracy”); Abner S. Greene, Kiyas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 14 (1996) (“multiple repositories of power”).

their own side in an argument. This fits with another of John's points in his manuscript: "[C]laims of scientific truth require three responses from environmental law. First, we must acknowledge that truth exists. Second, we must actively pursue the truth. And third, we must not reject the truth."<sup>15</sup>

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As a religious Christian, John did not reject the truth. Rather, he lived for it. But as a religious Christian who understood the virtue of humility, John also understood the virtue of accommodation, both within environmental law and more broadly. In my friendship with John, both his clear-eyed pursuit of what seemed right and his open-mindedness to perhaps being wrong were ever present. We met as twenty-three-year-old 1Ls at Michigan Law School and became fast friends—I'm tempted to say despite the differences in our religious upbringings and theistic perspectives, but perhaps it was because of such differences. I can't speak for John, but I believe I was drawn to what became a longtime, close, and fun friendship with John because we shared so much in spite of our differences. And that duality moved me and continues to move me in a distinctive way.

What did we share, you ask? Here are some items: (i) We had a passion for fun but competitive gaming. Eventually it boiled down to Scrabble and two-handed euchre (a terrific two-handed game!). But along the way it included Risk (John's wife Lisa usually won), Landslide, and Eurorails (for which I made a detailed chart of commodities, prices, and cities :). (ii) We had a passion for arguing gently about politics and the Supreme Court. In the end we probably agreed more than we disagreed... or maybe that's my John-influenced optimism. (John was a fun and funny optimist. For example, he always thought he/we would arrive somewhere earlier than any reasonable person would have thought possible!) (Oh and usually the reasonable person had the better view of timing.) (iii) We saw the ironies in things large and small—this shared sense of humor was probably at the core of our friendship. John was very funny, in a way that someone who knew him just as a devout conservative religious Christian might not have appreciated. (Then again, this is probably just my priors assuming what people assume about the devout.) For example, after John sent me a draft of something and I emailed him about a possible *Chadha*<sup>16</sup> problem (you can look it up), John wrote back: "As you'll see once you reach the second half [of] the paper,

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15 Nagle, *supra* note 5, ch. 8, at 6.

16 *INS v. Chadha*, 462 U.S. 919 (1983).

‘informal congressional direction’ includes a senator grabbing the director of the National Park Service by the collar and demanding that he authorize a certain project. I don’t recall that being addressed in *Chadha*.” What is irony, after all, but a kind of doubling, of the expected and the unexpected, of something from category A mixed with something from category B, where its appearance makes us smile. John did this frequently, and in me he had a welcome audience.

John was a man of supreme lovingkindness. He was patient. He was open-minded and open-hearted. He was a true friend, a smart friend, and a fun friend. He welcomed me into his home—and over time I got to know his parents, his siblings, his wife, and his children. He introduced me to his colleagues, and always hoped that when I visited the Nagles in Indiana, there would be a way to have a lunch or dinner with one or more of the Notre Dame Law faculty, as well.

John visited all seven continents. He was a talented nature photographer. He saw in us, in other animals, and in the natural world, a reflection, I think, of God’s lovingkindness, and of the prospect that things can be better. I think about John every day, and try my best to hold his theistic and existential optimism close to my heart.



